



International Organization for Migration (IOM)
The UN Migration Agency



ILLEGAL EMPLOYMENT OF THIRD-COUNTRY NATIONALS IN AUSTRIA



Saskia Heilemann

Co-funded by the
European Union



BM.I



REPUBLIC OF AUSTRIA
FEDERAL MINISTRY OF THE INTERIOR

The European Migration Network (EMN) is co-ordinated by the European Commission with National Contact Points (EMN NCPs) established in each EU Member State plus Norway. The National Contact Point Austria in the EMN is financially supported by the European Commission and the Austrian Federal Ministry of the Interior.

Saskia Heilemann

ILLEGAL EMPLOYMENT OF THIRD-COUNTRY NATIONALS IN AUSTRIA



International Organization for Migration (IOM)

The UN Migration Agency

The opinions expressed in the report are those of the author and do not necessarily reflect the views of the Austrian Federal Ministry of the Interior, the European Commission and/or the International Organization for Migration (IOM). The designations employed and the presentation of material throughout the report do not imply the expression of any opinion whatsoever on the part of IOM concerning the legal status of any country, territory, city or area, or of its authorities, or concerning its frontiers or boundaries.

IOM is committed to the principle that humane and orderly migration benefits migrants and society. As an intergovernmental organization, IOM acts with its partners in the international community to assist in meeting the operational challenges of migration, to advance understanding of migration issues, to encourage social and economic development through migration and to uphold the human dignity and well-being of migrants.

Publisher: International Organization for Migration,
Country Office for Austria
National Contact Point Austria in the
European Migration Network
Nibelungengasse 13/4, 1010 Vienna
Tel.: +43 1 585 33 22 0
Fax: +43 1 585 33 22 30
E-mail: iomvienna@iom.int, ncpaustria@iom.int
Internet: www.iomvienna.at, www.emn.at

© February 2017, International Organization for Migration (IOM)

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise without the prior written permission of the publisher.

European Migration Network

The European Migration Network (EMN) was launched in 2003 by the European Commission by order of the European Council in order to satisfy the need for a regular exchange of reliable information in the field of migration and asylum at the European level. Since 2008, Council Decision 2008/381/EC has constituted the legal basis of the EMN and National Contact Points (NCPs) have been established in the EU Member States (with the exception of Denmark, which has observer status) plus Norway.

The EMN's role is to meet the information needs of European Union (EU) institutions and of Member States' authorities and institutions by providing up-to-date, objective, reliable and comparable information on migration and asylum, with a view to supporting policymaking in the EU in these areas. The EMN also has a role in providing such information to the wider public.

The NCP Austria is – pursuant to an agreement with the Federal Ministry of the Interior – located in the Research and Migration Law Department of the Country Office for Austria of the International Organization for Migration (IOM). The IOM office was established in 1952 when Austria became one of the first members of the Organization. The main responsibility of the IOM Country Office is to analyse national migration issues and emerging trends and to develop and implement respective national projects and programmes.

The main task of the NCPs is to implement the work programme of the EMN including the drafting of the annual policy report and topic-specific studies, answering Ad Hoc Queries launched by other NCPs or the European Commission, carrying out visibility activities and networking in several forums. Furthermore, the NCPs in each country set up national networks consisting of organizations, institutions and individuals working in the field of migration and asylum.

In general, the NCPs do not conduct primary research but collect and analyse existing data and information. Exceptions might occur when these are not sufficient. EMN studies are elaborated in accordance with common study templates in order to achieve comparable results within the EU and Norway. Since the comparability of the results is frequently challenging, the EMN has produced a glossary, which ensures the application of similar definitions and terminology in all national reports.

Upon completion of national reports, the European Commission with the support of a service provider drafts a synthesis report, which summarizes the most significant results of the individual national reports. In addition, topic-based policy briefs, so-called EMN Informs, are produced in order to present selected topics and compare national results in a concise manner. All national studies, synthesis reports, informs and the Glossary are available on the website of the European Commission Directorate-General for Migration and Home Affairs.

Table of Contents

Introduction.....	1
Top-line “Factsheet”.....	3
Section 1: Contextual Overview of the General Situation Regarding Illegal Employment in Austria.....	5
Section 2: Prevention Measures	7
Section 3: Identification of Illegal Employment of Third-Country Nationals.....	13
Section 4: Sanctions for Employers.....	17
Section 5: Outcomes for Third-Country Nationals Found to be Working Illegally	23
Annexes	
A.1 Statistical Annex.....	32
A.2 List of Translations and Abbreviations.....	38
A.3 Bibliography.....	40

Introduction

Study aims:

The aim of this study is to map and analyse the measures in place at national level to address illegal employment of third-country nationals (TCNs), to identify potential problematic areas and obstacles, and to highlight strategies and best practices for overcoming the latter. In particular, the study briefly looks into the general contextual situation regarding illegal employment in Austria to investigate the extent to which illegal employment of TCNs is an issue in the country. The study then takes a closer look at each stage of the illegal employment cycle: (i) prevention measures and incentives for employers and employees to avoid illegal employment practices, along with a risk assessment analysis; (ii) identification of illegal employment, including the measures and techniques used to carry out inspections; (iii) sanctions for employers who illegally hire irregularly and regularly staying TCNs; and (iv) outcomes for TCNs found to be working illegally as well as protective measures.

Definitions:

Illegal employment is defined for the purpose of this study as an economic activity carried out in violation of provisions set forth in legislation and thus includes both (i) irregularly staying and illegally working TCNs and (ii) regularly staying and illegally working TCNs. The definition “violation of provisions set forth in legislation” includes various forms of completely or partially undeclared employment. The study focuses on employment regarded as illegal because of not complying with the Act Governing the Employment of Foreigners.¹ Such infringements account for 37 per cent (i.e. the majority) of the total number of criminal complaints lodged in 2016 involving TCNs suspected of being illegally employed (see QA.7 in Annex 1). The narrower research focus is on the illegal employment of TCNs, even though the illegal employment of posted workers from Eastern EU Member States is more prevalent in Austria.² Consequently, the Act to Combat Wage and Social Dumping³ is not a focus of this study; this Act plays an important role in Austria, mainly in combating exploitation in the labour market and the illegal employment of posted workers from EU Member States. This study covers the illegal employment of EU citizens only in cases where policies, measures or legal provisions do not make a distinction between EU citizens and TCNs. Self-employment and the posting of workers are similarly not covered.

Methodology:

The study was conducted by the National Contact Point (NCP) Austria in the European Migration Network (EMN) within the framework of the EMN’s 2015–2016 Work Programme. The study follows a common study template with a predefined set of questions developed by the EMN in order to facilitate comparability of the findings across all Member States.

The study is fundamentally based on desk research of legislative texts, national and international publications, studies and internet sites. It additionally draws on information obtained through continuous media monitoring by the International Organization for Migration (IOM), Country Office for Austria. Statistics were provided by the financial police.

To supplement the information obtained through desk research, qualitative semi-structured face-to-face interviews were carried out with experts. These were specifically:

- Heinz Kutrowatz, Head of Department VI/B/ST International Labour Market Law, Federal Ministry of Labour, Social Affairs and Consumer Protection;
- Wilfried Lehner, Director of the financial police;
- Sandra Stern, Drop-in Centre for Undocumented Workers (UNDOK).

While the author of this study is aware of the issues related to using the term “illegal” in this context, the terminology used here is in accordance with the common study template, which follows the Asylum and Migration Glossary of the European Migration Network (EMN, 2014).

¹ FLG No. 218/1975, in the version of FLG I No. 113/2015.

² Interview with Heinz Kutrowatz, Federal Ministry of Labour, Social Affairs and Consumer Protection, 19 December 2016; Interview with Wilfried Lehner, financial police, 21 December 2016.

³ FLG I No. 44/2016.

The study was compiled by Saskia Heilemann (née Koppenberg, Research Associate, IOM Country Office for Austria) under the supervision of Julia Rutz (Head of Research and Migration Law, IOM Country Office for Austria). Legal advice was provided by Rainer Lukits (Legal Associate, IOM Country Office for Austria). Thanks go also to Tijana Lujic for conducting literature research and to Sara Gratt for conducting media research and for transcribing the expert interviews (both Interns, IOM Country Office for Austria).

Top-line "Factsheet"

- ★ Extent to which illegal employment of third-country nationals (TCNs) is an issue in general in your (Member) State;
- ★ Key prevention and identification measures regarding illegal employment of TCNs in place in your (Member) State;
- ★ Possible sanctions for employers and sanctions and other outcomes for TCNs;
- ★ Mechanisms on access to justice and enforcement of rights of illegally employed TCNs;
- ★ Challenges as well as good practices in the field.

Section 1: Combating illegal employment in all its aspects is a political priority in Austria, while the identification of irregularly staying and illegally working third-country nationals (TCNs) has a particularly high priority. However, looking at the **general situation of illegal employment**, it becomes clear that the undocumented employment of posted workers from Eastern EU Member States, in conjunction with wage dumping, is the dominant form of illegal employment in Austria. In 2015, 73 per cent of the total number of illegal employees detected in Austria were EU citizens.⁴ The sectors most affected are construction, catering and tourism, and agriculture; here domestic work is not considered.

Section 2: The key **measure** in Austria **to prevent illegal employment** of foreigners is to provide employers and employees alike with information about residence/settlement and labour market access. Such information is provided through avenues including websites, brochures and counselling. The effectiveness of providing information to employees in particular is hampered, however, if they are not informed about whether a work permit has been issued. The Federal Ministry of Labour, Social Affairs and Consumer Protection nonetheless views providing information, carrying out inspections and imposing the sanctions specified in legislation as factors effective in preventing the illegal employment of foreigners. The prevention measures do not distinguish between irregularly and regularly staying illegal employees and do not specifically target the illegal employment of TCNs.

Section 3: Key **identification measures** comprise inspections and checks of company premises and vehicles at roadside by the financial police. During such on-site verification, it is mainly the employees that are interviewed and their documents checked. These inspections and checks are general in nature and aimed at all employees, whether irregularly or regularly staying and whether TCNs, EU citizens or nationals, since the nationality and residence status of those affected are usually not known beforehand. Verification is limited in effect, inasmuch as it cannot be comprehensive due to staff limitations and access restrictions. It is nevertheless assumed to have a certain deterrent effect, which can be further enhanced by making such activities public.

Section 4: In Austria it is always the employer that is sanctioned in cases of illegal employment because it is his/her responsibility to ensure that employment is documented and orderly in accordance with the Act Governing the Employment of Foreigners⁵ (Deutsch/Nowotny/Seitz, 2014:506). Austrian law provides for various **sanctions for employers** who illegally hire foreign employees. Such sanctions do not distinguish between TCNs and EU citizens. Specific fines and terms of imprisonment are specified for employing irregularly staying foreigners, thereby implementing Art. 9 of the Employers' Sanctions Directive (2009/52/EC).⁶ According to the Federal Ministry of Labour, Social Affairs and Consumer Protection, the strength of sanctions for employers in Austria lies in the rather severe penalties, which are believed to have a correspondingly deterrent effect. A downside of some sanctions is that they can indirectly affect illegally employed foreigners, even if responsibility for illegal employment does not lie with them.

⁴ Federal Ministry of Finance, *Reply to the Parliamentary Request No. 9964/J (XXV.GP) of 11 July 2016 regarding "illegale Ausländerbeschäftigung in Tirol"* (9519/AB of 9 September 2016). Available at www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_09519/imfname_558284.pdf (accessed on 21 October 2016).

⁵ FLG No. 218/1975, in the version of FLG I No. 113/2015.

⁶ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24.

Section 5: There are no **sanctions for TCNs** because in Austria a foreign employee cannot be punished for being illegally employed (Deutsch/Nowotny/Seitz, 2014:507). Therefore, fines or detention are not imposed for illegal employment as such but only for staying irregularly or in order to enforce a removal. Illegally employed foreigners can, however, face various other consequences such as the issuance of a return decision and entry ban or the loss of residence rights. This applies to regularly and irregularly staying foreigners alike. No provision exists for regularization of the employment or the residence status. But victims of trafficking and other TCNs have the legal option of applying for a humanitarian residence title for exceptional circumstances.

With regard to **access to justice and enforcement of rights** in the case of illegally employed TCNs, Austrian law specifies that foreigners have the same entitlements towards their employers regardless of whether a valid employment contract exists. In addition, it is assumed that employment lasted at least three months unless proven otherwise (see Art. 29 para 1 Act Governing the Employment of Foreigners). While these provisions facilitate the enforcement of rights, enforcement is nonetheless a challenge because illegally employed foreigners are often not aware of their rights. In combination with applicable limitation and expiry periods this lack of information often leads to entitlements expiring before illegally employed foreigners have a chance to claim them. But even if they know their rights, experience shows that lodging a valid claim is a challenge for illegal employees. In order to do so they need to gather evidence and testify against their employers, which they are often incapable of due to their vulnerability.

Section 1: Contextual Overview of the General Situation Regarding Illegal Employment in Austria

Q1. Please provide an overview of the **general situation with regard to illegal employment** of third-country nationals (TCNs) on the basis of available research and information in your (Member) State, including, *inter alia*:

- Q1a.** Extent to which the grey and informal economy is present in your (Member) State;
- Q1b.** Extent to which fighting illegal employment is a political priority in your (Member) States;
- Q1c.** Public and/or policy debates in the area of illegal employment;
- Q1d.** Extent to which illegal employment of TCNs is an issue in your (Member) State (e.g. severity and intensity of the issue), in particularly concerning the TCNs;
- Q1e.** Available research on the main routes to an irregular employment situation in your (Member) State;
- Q1f.** Any (planned) changes in law or practice in the field of illegal employment;
- Q1g.** Issues with illegal employment in particular industries and sectors and particular types of employer (e.g. is it more prevalent in SMEs or larger businesses, start-ups or more established businesses?);
- Q1h.** Profiles of the illegally working individuals (EU, EEA or TCNs);
- Q1i.** Other related issues experienced in your (Member) State which may directly affect the extent of illegal employment in your (Member) State, such as corruption, trafficking in human beings, etc.

Please specify the reference/source of the information.

In Austria, the shadow economy was forecast to amount to EUR 20.5 billion in 2016, representing 7.8 per cent of the gross domestic product (GDP). In comparison to other Member States of the European Union (EU), Austria has the smallest shadow economy. The shadow economy was forecast to account for an average of 17.9 per cent of the GDP of the EU-28 in 2016 (Schneider, 2016:7, 11). The link between the shadow economy and illegal employment can be explained as follows: legal goods are produced illegally through illegal employment and the resulting added value contributes to GDP (Enste/Schneider, 2006:38–39).

According to the Federal Ministry of Labour, Social Affairs and Consumer Protection, combating all aspects of illegal employment, ranging from social insurance fraud to illegal employment of foreigners, is a political priority in Austria.⁷ Within illegal employment, the identification of irregularly staying and illegally working third-country nationals (TCNs) has a particularly high priority for the financial police. However, both authorities observe that the illegal employment of TCNs crossing the border into Austria irregularly was more prevalent before the eastern enlargement of the EU. The main form of illegal employment now involves posted workers from eastern EU Member States and includes wage dumping. The shift was primarily caused by the changing geopolitical circumstances while the countries of origin have largely remained the same.⁸ Hence, public and media debates rarely touch on the illegal employment of TCNs but rather focus on the aspect of social and wage dumping in the context of workers from eastern EU Member States who work illegally in Austria, often under exploitative conditions.⁹ Accordingly, the Act to Combat Wage and Social Dumping¹⁰ is considered a key law in Austria with regard to illegal employment, especially since its 2016 amendment, which introduced stricter sanctions against underpayment along with provisions regarding the posting of workers (regardless of their nationality), thereby implementing the Enforcement Directive (2014/67/EU)¹¹ in national law.¹² With regard to illegal employment of

⁷ Interview with Heinz Kutrowatz, Federal Ministry of Labour, Social Affairs and Consumer Protection, 19 December 2016.

⁸ Ibid; Interview with Wilfried Lehner, financial police, 21 December 2016.

⁹ See, for example, Die Presse, *Ausgebeutet mit System: Wiens neue Sklaven*, n.d., available at http://diepresse.com/layout/diepresse/files/dossiers/wiens_neue_sklaven/ (accessed on 7 December 2016); Die Presse, *Strengere Regeln für Job-Migranten?*, 3 March 2016, available at http://diepresse.com/home/wirtschaft/recht/4942832/Strengere-Regeln-fuer-JobMigranten?_vi_backlink=/home/wirtschaft/index.do (accessed on 7 December 2016).

¹⁰ FLG I No. 44/2016.

¹¹ Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159/11.

TCNs, the main recent legislative development was the 2011 amendment of the Act Governing the Employment of Foreigners,¹³ which implemented the provisions of the Employers' Sanctions Directive (2009/52/EC)¹⁴ in national law.

Available primary research on illegal employment in Austria in general and on the main routes to an illegal employment situation in particular is rare and mainly dates back to 2007 and 2013 (see Jandl et al., 2009; Jandl/Hollomey/Stepien, 2007). Jandl et al. found that there is a considerable and permanent but seasonally fluctuating demand for illegally working migrants in a number of sectors of the Austrian economy, which is mainly a response to the high level of taxes and social security contributions applying to regular employment (Jandl et al., 2009:214). Correspondingly, the Special Eurobarometer survey found that among 76 per cent of respondents a lower price was the reason for buying goods or services that potentially involved undeclared work (EC, 2014:42). When seeking illegal employment, obtaining referrals from family and friends or colleagues is seen as the most important search strategy. Recruitment agencies also frequently play a role in placing migrants in illegal employment, especially in the domestic care sector (Jandl/Hollomey/Stepien, 2007:7, 28). Looking at the supply side, respondents to the Special Eurobarometer survey considered the following to be reasons for taking on undeclared work: salaries in the regular market are too low (43%), there are too few regular jobs (26%), and taxes and/or social security contributions are too high (26%) (EC, 2014:102).

No recent research is available on the dominant sectors for illegal employment in Austria or on the profiles of illegally working migrants. A study in 2007 found that – not considering domestic work¹⁵ – the estimated share of illegally employed foreigners in relation to the total number of employees was largest in the construction sector (some 15% of total employment), followed by the catering and tourism sector (15%), and agriculture (13%) (Jandl/Hollomey/Stepien, 2007:36). However, according to the financial police, since EU enlargement the labour-intensive sectors such as construction and agriculture have become dominated by posted workers from eastern EU Member States, with wage dumping also playing a role. Now, therefore, illegal employment is most prevalent in the catering and tourism sector.¹⁶ Data from 2015 on the number and country of origin of detected illegally employed foreigners (including employment that is illegal because of undeclared social insurance or underpayment)¹⁷ show that EU citizens represented 73 per cent of all detected illegal employees in Austria.¹⁸

In Austria, labour exploitation and trafficking in human beings are related issues which may directly affect the extent of illegal employment. Research carried out in 2014 by the European Agency for Fundamental Rights (FRA) found that working in an illegal situation is an important risk factor for exploitation. The top three economic sectors in Austria in which workers are at risk of labour exploitation are (i) construction, (ii) agriculture, forestry and fishing, and (iii) work in households (FRA, 2015:44, 48). These sectors are also among those in which illegal employment is the most prevalent (see above). According to a scheme presented by FRA, various forms of labour exploitation exist, forming a continuum of severity of abuses that ranges from slavery to relatively minor forms of exploitation (FRA, 2015:34). In this context, victims of any form of labour exploitation can additionally become victims of trafficking in human beings, specifically in situations where the circumstances correspond to the elements defining the offence of trafficking: a specific action is taken (such as recruitment), illicit means are used and the action is carried out for the purpose of exploitation (Art. 2 of the Anti-Trafficking Directive (2011/36/EU)¹⁹).

¹² Interview with Heinz Kutrowatz, Federal Ministry of Labour, Social Affairs and Consumer Protection, 19 December 2016; Interview with Wilfried Lehner, financial police, 21 December 2016; Interview with Sandra Stern, Drop-in Centre for Undocumented Workers (UNDOK), 16 December 2016.

¹³ FLG No. 218/1975, in the version of FLG I No. 113/2015.

¹⁴ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24.

¹⁵ On the challenge in calculating the share of illegal employment in the domestic work sector see Q9. The estimated annual average total number is 29,000 illegally employed foreigners in care and 24,000 in the cleaning of private households (Jandl/Hollomey/Stepien, 2007:37).

¹⁶ Interview with Wilfried Lehner, financial police, 21 December 2016.

¹⁷ Including infringements of the Act Governing the Employment of Foreigners as well as of the General Social Insurance Act, the Employment Contract Law Adaptation Act and the Temporary Employment Act.

¹⁸ Federal Ministry of Finance, *Reply to the Parliamentary Request No. 9964/J (XXV.GP) of 11 July 2016 regarding "illegale Ausländerbeschäftigung in Tirol"* (9519/AB of 9 September 2016). Available at www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_09519/imfname_558284.pdf (accessed on 21 October 2016).

¹⁹ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1.

Section 2: Prevention Measures

Q2. Please describe the types of **preventive measures** targeting third-country nationals (TCNs) as well as employers of TCNs to discourage them from employing a TCN illegally in your (Member) State:

Q2a. Preventive measures and incentives for employers: Please indicate which measures and incentives for employers exist in your (Member) State and describe the measures.

Measure/incentives for employers	<u>Irregularly staying and illegally working TCNs</u> <i>*Please indicate if the measures/incentives below exist in your (Member) State (Yes/No) and if Yes, please describe them.</i> <i>**Please specify if these measures are established to tackle illegal employment or are general incentives.</i>	<u>Regularly staying and illegally working TCNs</u> <i>*Please indicate if the measures/incentives below exist in your (Member) State (Yes/No) and if Yes, please describe them.</i> <i>**Please specify if these measures are established to tackle illegal employment or are general incentives.</i>
a.1. Information campaigns targeted at employers <i>Outreach/awareness-raising activities to inform employers on the criteria by which they can hire TCNs</i> For each campaign that has been run in your MS indicate: - Which sectors were targeted? - How the campaign was conducted? (e.g. through advertising, visits and talks by government officials visits, etc.)	No.	No.
a.2. Information support for employers <i>Simplification of administrative procedures and information support for employers recruiting TCNs (e.g. helpline, information on government website etc.)</i>	See column at right (no distinction is made between irregularly and regularly staying illegal employees).	Yes. The Federal Government's website www.migration.gv.at provides information in German and English on the requirement for immigration to and residence/settlement in Austria including the respective labour market access rights and required documentation. It also provides a contact form allowing interested individuals to get in touch with the particular ministry responsible in their case, before or during their stay in Austria. Through the website, the Federal Ministry of Labour, Social Affairs and Consumer Protection also regularly receives requests for information support and clarification from employers. ²⁰

²⁰ Interview with Heinz Kutrowatz, Federal Ministry of Labour, Social Affairs and Consumer Protection, 19 December 2016.

		<i>This is a rather general measure that does not specifically tackle the illegal employment of foreigners or of TCNs.</i>
a.3. Partnership agreements and initiatives by Social Partners <i>Conclusion of agreements between trade unions and employer organisations in the same sector (e.g. construction industry) establishing bilateral agreements of actions to curb illicit activities.</i>	See column at right (no distinction is made between irregularly and regularly staying illegal employees).	<p>The Vienna Chamber of Labour, for example, together with several trade unions supports the Drop-in Centre for Undocumented Workers (UNDOK). For further information see Q2b.3 and Q19a. Partnership agreements between trade unions and employer organizations are not available, according to the Austrian Federal Economic Chamber. The Austrian Federal Economic Chamber and the Federation of Austrian Industries – both employer organizations – do not see a need for initiatives or agreements since Austrian law provides for comprehensive regulations and strict sanctions and in addition intensive controls are carried out.²¹</p> <p>See also Q2b.2.</p>
a.4. Obligation of the employer to notify the authorities about employing a TCN	See column at right (no distinction is made between irregularly and regularly staying illegal employees).	<p>The employer has to notify the competent regional branch of the Public Employment Service within three days of the beginning of the employment of a foreigner to which the regulations of the Act Governing the Employment of Foreigners²² apply and who does not hold a “Permanent Residence – EU” residence title (see Art. 26 para 5 Act Governing the Employment of Foreigners).</p> <p>Furthermore, employers generally have to notify the competent health insurance institution before they employ any employee (Art. 33 General Social Insurance Act²³).</p> <p><i>This measure specifically tackles illegal employment but not only of TCNs.</i></p>
a.5. Other measures/incentives for employers	See column at right (no distinction is made between irregularly and regularly staying illegal employees).	<p>Disclosure obligation:</p> <p>The employer is obliged upon request to disclose the number and names of employed foreigners to the national and regional branches of the Public Employment Service, the health insurance institutions, and the tax authorities (Art. 26 para 1</p>

²¹ Written input by Margit Kreuzhuber, Austrian Federal Economic Chamber, 8 February 2017; Written input by Katharina Lindner, Federation of Austrian Industries, 10 January 2017.

²² FLG No. 218/1975, in the version of FLG I No. 113/2015.

²³ FLG No. 189/1955, in the version of FLG II No. 260/2016.

		<p>Act Governing the Employment of Foreigners).</p> <p>Threat of penalty:</p> <p>According to the Federal Ministry of Labour, Social Affairs and Consumer Protection, the rather severe penalties on illegal employment laid down in the Act Governing the Employment of Foreigners (see Section 4) have a deterrent effect especially in combination with the inspections carried out by the financial police (see Section 3).²⁴</p> <p>Threat of inspections:</p> <p>The financial police partly carry out inspections visible to the public or with media coverage in order to deter employers from engaging in illegal employment.²⁵</p> <p><i>These measures specifically tackle illegal employment but not only of third-country nationals.</i></p>
--	--	---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Q2b. Measures and incentives for employees from third countries: Please indicate which measures and incentives for employees from third countries exist in your (Member) State and describe the measures.

Measure/incentive for employees	<u>Irregularly staying and illegally working TCNs</u> <i>Please indicate if the measures/incentives exist in your (Member) State (Yes/No) and if Yes, please describe them.</i>	<u>Regularly staying and illegally working TCNs</u> <i>Please indicate if the measures/incentives exist in your (Member) State (Yes/No) and if Yes, please describe them.</i>
b.1. Financial incentives for employees <i>Financial and fiscal incentives, including social security incentives – i.e. any social security incentives aimed at encouraging employers to legally register their employees</i>	No.	No.
b.2. Information campaigns targeted at employees (potential or current) <i>(including pre-departure campaigns and</i>	See column at right (no distinction is made between irregularly and regularly staying illegal employees).	A coalition consisting of the Austrian Trade Union for Production Workers (Pro-GE) and of agricultural worker activists is running in cooperation with non-governmental

²⁴ Interview with Heinz Kutrowatz, Federal Ministry of Labour, Social Affairs and Consumer Protection, 19 December 2016.

²⁵ Interview with Wilfried Lehner, financial police, 21 December 2016.

<p><i>post-departure campaigns in third countries)</i></p> <p>For each campaign that has been run please:</p> <ul style="list-style-type: none"> - Provide detail of the campaigns, including who are the target groups; what country, type of workers, etc. - Explain how the campaign was conducted? (e.g. through advertising, visits and talks by government officials visits, etc.) 		<p>organizations an information campaign for seasonal workers in the agricultural sector. The campaign includes a website and leaflets providing information about seasonal workers' rights (e.g. wages and working hours) and a billboard campaign that was carried out in 2016. Furthermore, free counselling and support in enforcing rights is provided. The information is available in various languages.²⁶</p> <p><i>This measure specifically tackles illegal employment but not only of TCNs.</i></p>
<p>b.3. Information support for employees from third countries</p> <p><i>(e.g. One-stop shop information points)</i></p>	<p>See column at right (no distinction is made between irregularly and regularly staying illegal employees).</p>	<p>Yes.</p> <p>The Drop-in Centre for Undocumented Workers (UNDOK)²⁷ provides information to undocumented workers (and in particular to TCNs) about their labour rights.²⁸ For further information see Q19a.</p> <p><i>This measure specifically tackles illegal employment but not only of TCNs.</i></p> <p>The Federal Government's website www.migration.gv.at provides information in German and English. For further information see Q2.a.2.</p> <p><i>This is a rather general measure that does not specifically tackle the illegal employment of foreigners or of TCNs.</i></p>
<p>b.4. Other measures/incentives for employees (incl. obligation of TCN to notify the authorities about any changes in employment conditions)</p>	<p>No.</p>	<p>No.</p>

²⁶ Pro-GE, *Information portal for seasonal workers*, available at www.sezonieri.at/servlet/ContentServer?pagename=P01/Page/Index&n=P01_64.0 (accessed on 1 February 2017).

²⁷ UNDOK - Anlaufstelle zur gewerkschaftlichen Unterstützung UNDOKumentiert Arbeitender, <http://undok.at/> (accessed on 28 November 2016).

²⁸ Interview with Sandra Stern, Drop-in Centre for Undocumented Workers (UNDOK), 16 December 2016.

Q3. Does your (Member) State carry out **risk assessments** to identify the sectors of activity ('sensitive sectors') in which the illegal employment of TCNs is most concentrated? (Yes/No)

Yes.

Please indicate if there are differences between the two main categories of TCNs:

(i) irregularly staying and illegally working TCNs and (ii) regularly staying and illegally working TCNs

If **Yes**, please describe:

Q3a. What are the **methods and tools** used for carrying out the risk assessments?

All activities by the financial police and the resulting facts ascertained (in particular the inspected businesses and employees, sectors, the identified illegally employed Austrian and foreign citizens, and the number and type of infringements) are recorded in a data and information system and are statistically evaluated. From this data pool, the risk sectors are identified based on the relation of the number of inspections carried out to the infringements identified (EMN, 2015a:4).

Q3b. Which **authorities** are involved in drawing up the risk assessment?

The financial police.

Q3c. How are the **results** of the risk assessments used in practice (e.g. used to target inspections)?

The results based on the data pool are used on the one hand to target inspections at the identified high-risk sectors. Inspections are also targeted at low-risk sectors in order to monitor any new developments.²⁹

Q4a. What are the **strengths and weaknesses** of prevention measures of illegally employed TCNs in your (Member) State? Please reference the sources of the information provided.

According to the Federal Ministry of Labour, Social Affairs and Consumer Protection, the penalties for illegal employment laid down in legislation as well as the inspections carried out by the financial police have a deterrent effect. In combination with the information provided to employees through the website www.migration.gv.at and with replies given to individual information requests, such measures are regarded as effective in the prevention of illegal employment.³⁰

In the experience of UNDOK there are cases of foreigners who work illegally without being aware of it,³¹ even though Art. 20 para 3 Act Governing the Employment of Foreigners provides that a copy of the written decision on the work permit has to be delivered to the foreigner.³² In the case of combined work and residence permits (e.g. Red-White-Red Card, EU Blue Card) the foreign employee is the applicant and therewith enjoys the full status of party to the procedure including a delivery of the written decision (see Art 20d para 1 Act Governing the Employment of Foreigners). However, according to the Federal Ministry of Labour, Social Affairs and Consumer Protection, there are sometimes practical problems with regard to the delivery. For example, when the foreigner changes his/her address during the application procedure but does not inform the authorities or when only the address of the prospective employer is indicated (reasons for delivery problems can be manifold).

²⁹ Interview with Wilfried Lehner, financial police, 21 December 2016.

³⁰ Interview with Heinz Kutrowatz, Federal Ministry of Labour, Social Affairs and Consumer Protection, 19 December 2016.

³¹ UNDOK, *Politische Forderungen*. Press release, 7 September 2015, available at https://undok.at/wp-content/uploads/2015/09/UNDOK-Anlaufstelle_Politische-Forderungen.pdf (accessed on 29 December 2016).

³² The employer applies for a work permit on behalf of the employee. The employee is not recognized as a party to the procedure (see Art. 4 para 1 and Art. 21 Act Governing the Employment of Foreigners).

Q4b. What **good practices** can be identified in your (Member) State in the area of prevention of illegal employment? What were the particular success factors with measures that can be identified as good practices? Please reference the sources of the information provided.

In the experience of UNDOK, close collaboration and continuous information exchange among the various actors involved are crucial if illegal employees are to be provided with effective information support and counselling (UNDOK, 2016:5). Also the statement of the Federal Ministry of Labour, Social Affairs and Consumer Protection under Q4a can also be seen as good practice.

Section 3: Identification of Illegal Employment of Third-Country Nationals

Q5a. Which types of **national authorities** are responsible for identification of illegally employed third-country nationals (TCNs)?

**Please indicate if there are any differences in the approach to identification between the two main categories of TCNs: (i) irregularly staying and illegally working TCNs and (ii) regularly staying and illegally working TCNs.*

***Please specify if these authorities are specifically tasked to identify illegally employed TCNs or involved in general checks on illegal employment.*

The Federal Ministry of Finance is responsible for monitoring compliance with the Act Governing the Employment of Foreigners.³³ More precisely, the financial police under the Federal Ministry of Finance have as their main responsibility the identification of illegally employed foreigners.³⁴ The financial police carry out general checks for illegal employment, including the illegal employment of nationals and foreigners, whereas the focus is on the identification of illegally employed foreigners (Lindmayr, 2012:67).³⁵ The approach is the same for all groups (simply because the nationality and residence status of the person checked is usually unknown beforehand). Nonetheless, the identification of irregularly staying and illegally working third-country nationals (TCNs) has a high priority.³⁶

Q5b. Are there special authorities responsible for **specific sectors**? If yes, please describe.

No.³⁷

Q5c. With regard to labour inspectorates, do they have **separate functions/departments** targeted to the detection of illegal employment of migrants from third countries?

No.³⁸

Q5d. How do national authorities and other organizations involved **cooperate**? Are there any specific cooperation mechanisms/fora in place in your (Member) State? Is there any legal basis specifying that authorities must cooperate, including a cooperation agreement or it is done on an ad-hoc basis by authorities?

Cooperation takes place between the financial police and the Federal Ministry of Labour, Social Affairs and Consumer Protection, the latter being responsible for drafting legislation and implementing the law. For example, the Federal Ministry issues implementing decrees that concern the financial police (as well as other institutions), while also consulting with the financial police and tapping their expertise when preparing new legislation.³⁹ Furthermore, the financial police cooperate on an ad hoc basis with the social partners when planning inspections (see Q7c) and as specified by law – where required – with the public security services when carrying out inspections (see Q7f).

Q5e. Please provide **statistics on the number of staff/inspectors** involved in identification/inspections on illegal employment per authority and if available, per sector for 2015 (or if not available for latest available year). Please specify if the staff is specifically dedicated to identifying illegally employed TCNs or are involved in general checks on illegal employment.

On 1 January 2016 the financial police had 477 full-time equivalent staff members (excluding those on parental leave) (Federal Ministry of Finance, 2016:7). The staff are tasked with tax supervision and enforcing regulatory measures. Within these activities, all staff are capable of carrying out general checks for illegal employment, this

³³ FLG No. 218/1975, in the version of FLG I No. 113/2015.

³⁴ Interview with Wilfried Lehner, financial police, 21 December 2016.

³⁵ Federal Ministry of Finance, *Financial Police*. Available at <https://english.bmf.gv.at/combating-fraud/Financial-Police.html> (accessed on 28 November 2016).

³⁶ Interview with Wilfried Lehner, financial police, 21 December 2016.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Interview with Heinz Kutrowatz, Federal Ministry of Labour, Social Affairs and Consumer Protection, 19 December 2016.

being the main task of the financial police. No staff members are specifically dedicated to identifying illegally employed TCNs.⁴⁰

Q6. What **identification measures** regarding illegal employment of TCNs exist in your Member State? (e.g. inspections; border checks; checks of premises by migration officials; other types of checks) Please describe.

Identification measures comprise inspections and checks. The financial police carry out inspections of companies, business establishments, business premises and field offices and within staff rooms and vehicles as well as checks of the workers identified in these places.⁴¹ Verification is also carried out in some cases in the vicinity of national borders and in vehicles on main highways.⁴²

Q7. How are **inspections carried out** in your (Member) State?

**Please provide information if any differences exist between the two main categories of TCNs: (i) irregularly staying and illegally working TCNs and (ii) regularly staying and illegally working TCNs.*

As mentioned above (see Q5a) the approach is the same for both categories as well as other foreigners and nationals since the nationality and residence status of the person checked is usually not known before the inspection.⁴³

More specifically, please answer the following questions:

Q7a. What **methods** are used **for selecting/sampling** employers to be inspected (targeted labour inspections to specific sectors/categories of TCNs)?

Most inspections are carried out on the basis of information received (for example through tip-offs) from private individuals, from employees (such as co-workers) or from various other sources such as bidders in tenders or other public authorities (for example health or sanitary inspectors) (Jandl et al., 2009:57). In addition, the financial police follow their own inspection strategy. For example, controls can take place at all companies belonging to a certain sector and in a pre-defined district and time period (Jandl et al., 2009:57).

Q7b. How are **inspections planned**? Are they based on the results of a risk assessment?

Inspections are carried out in line with the results of a risk assessment based on the data and information system maintained by the financial police (See Q3c). In addition, specific sectors, regions or times of a day are also targeted.⁴⁴

Q7c. Could inspections be **triggered by reporting**/signals from (a) the general public (e.g. whistleblowers) and (b) from illegally employed TCNs? Is there a hotline established to signal illegal employment cases? If yes, please describe.

Yes. The majority, that is, around 60 per cent of the inspections carried out by the financial police, are triggered by reporting. Signals come from the general public, competitors or other persons (see also Q7a). Inspections are carried out in coordination with social partners such as the Economic Chamber and the Chamber of Labour who report problem areas to the financial police.⁴⁵ Another example is the "Moonlighting Hotline" run by the Economic Chamber in several provinces, which individuals can call to report illegal self-employment and illegal employment. The reported information is subsequently passed on to the financial police.⁴⁶

⁴⁰ Interview with Wilfried Lehner, financial police, 21 December 2016.

⁴¹ Federal Ministry of Finance, *Financial Police*. Available at <https://english.bmf.gv.at/combating-fraud/Financial-Police.html> (accessed on 28 November 2016).

⁴² Interview with Wilfried Lehner, financial police, 21 December 2016.

⁴³ Ibid.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ See, for example, Economic Chamber of Carinthia, *Pfuscherhotline*. Available at www.wko.at/Content.Node/branchen/k/Pfuscherhotline.html (accessed on 28 December 2016).

Q7d. Which authorities (a) **decide** on carrying out the inspections and (b) **carry out** the inspections?

The financial police.⁴⁷

Q7e. Which elements are checked? (e.g. checking employees residence and/or employment permits or inspecting employer records (payslips, contracts of employment, etc.)

The financial police check all relevant documents and compare the information with the respective databases (such as the social insurance, Public Employment Service and migration databases).⁴⁸ In doing so, the financial police verify, for example, whether the workers identified have the proper permits under employment law and residence and settlement law, whether any underpayment punishable under the Act to Combat Wage and Social Dumping exists,⁴⁹ and whether there is any evidence of breaches of the General Social Insurance Act.⁵⁰

Q7f. What are the entry/search powers of inspectorates? Do labour inspectorates cooperate with the police/other law enforcement authorities while carrying out inspections? If yes, are cases of illegal employment of TCNs/exploitation automatically **reported to police/law enforcement** authorities?

The financial police have extensive powers to enable them to fulfil their tasks (Deutsch/Nowotny/Seitz, 2014:481). These powers include the right to information (where relevant to labour law), the right to enter property (in the case of business/work premises, construction sites or pieces of land), the right to search vehicles (where used by the employer), the right to establish a person's identity (where presumed to be a foreign worker), and the right to arrest any irregularly staying foreigner (Art. 26 Act Governing the Employment of Foreigners, Art. 12 Fiscal Administration Act⁵¹). Consequently, the financial police do not consider it necessary in principle to cooperate with the public security services when carrying out inspections.⁵² Members of the public security services (such as officers belonging to the aliens police or the traffic police) are nonetheless required upon request to provide assistance in carrying out inspections (Art. 27 para 3 Act Governing the Employment of Foreigners). Besides business premises and places of work, the members of the public security services are also authorized to enter any other property, room, vehicle or container, if for example reasons exist for assuming such action to be necessary in order to detect irregularly staying foreigners who are pursuing illegal employment (Art. 36 para 1 subpara 4 and para 1a Aliens Police Act⁵³).

When the financial police detect a case of illegal employment (i.e. infringements of Art. 28 Act Governing the Employment of Foreigners), this is immediately reported to the responsible administrative penal authorities and charges are filed against the employer. Particularly serious cases of illegal employment of foreigners (i.e. infringements of Art. 28c Act Governing the Employment of Foreigners) are reported to the public prosecutor's office (Deutsch/Nowotny/Seitz, 2014:508, 526).⁵⁴ Any foreigner arrested has to be immediately transferred by the financial police to the aliens police or the nearest security services (Art. 26 para 4 Act Governing the Employment of Foreigners).

Q7g. How often are inspections carried out in different sectors? Are inspections conducted at random intervals? If so, please give an indication of time between visits.

The number of inspections to be carried out is determined annually in advance in the objectives and performances agreement between the financial police and the Federal Ministry of Finance. The overall number includes both tax supervision and regulatory measures and depends on the number of available staff members of the financial police as well as priorities set within the two areas of activity (EMN, 2015a:4).⁵⁵ Over the past three years an average of

⁴⁷ Interview with Wilfried Lehner, financial police, 21 December 2016.

⁴⁸ Ibid.

⁴⁹ FLG I No. 44/2016.

⁵⁰ FLG No. 189/1955, in the version of FLG II No. 260/2016; Federal Ministry of Finance, *Financial Police*. Available at <https://english.bmf.gv.at/combating-fraud/Financial-Police.html> (accessed on 28 November 2016).

⁵¹ FLG I No. 9/2010, in the version of FLG I No. 105/2014.

⁵² Interview with Wilfried Lehner, financial police, 21 December 2016.

⁵³ FLG I No. 100/2005, in the version of FLG I No. 24/2016.

⁵⁴ Interview with Wilfried Lehner, financial police, 21 December 2016.

⁵⁵ Ibid.

31,000 companies were inspected each year in Austria (2014:34,711; 2015: 30,425; January–June 2016: 14,597).⁵⁶

Q7h. How are inspections carried out (e.g. on-sight inspections/controls; interviewing and checking workers)?

Inspections by the financial police take the form of on-site checks during which mainly the employees are interviewed, documents are verified and the information is compared with the respective databases (including the social insurance, Public Employment Service and migration databases).⁵⁷

Q8. What technical tools and methods are in use for identification of illegal employment of TCNs (e.g. planning maps, criteria to select enterprises, manuals, operational guidelines, checklists and scripts for interviews, visit protocols and visit follow up procedures)?

When carrying out inspections the staff members of the financial police are equipped with laptops and internet access, and office vans are largely used. These technical tools enable the staff to record information and to access all relevant databases (including the social insurance, Public Employment Service and migration databases) immediately.⁵⁸

Q9. What are the strengths and weaknesses of identification measures of illegally employed TCNs in your (Member) State? What good practices can be identified in your (Member) State in the area of identification of illegal employment? What were the particular success factors with measures that can be identified as **good practices**?

From several research studies and the experts consulted it is clear that various aspects limit the effectiveness of control measures. The Federal Ministry of Labour, Social Affairs and Consumer Protection and the financial police both stress, for example, that despite increasing the number of staff carrying out inspections it is still a challenge to check contractors and sub-contractors across several countries or to generate a more generalized deterrent effect.⁵⁹ According to the financial police, control measures nevertheless have a deterrent effect to a certain extent, which can be reinforced by carrying out inspections publicly or with media coverage.⁶⁰ Another challenge identified by FRA (2015:67) and Jandl/Hollomey/Stepien (2007:39–40) is seen in the fact that without court authorization the financial police have no access to private homes, so that there are often no inspections of domestic work.

The weaknesses and strengths of identification measures outlined above refer to illegally employed foreigners in general and are not specific to TCNs.

⁵⁶ Federal Ministry of Finance, *Reply to the Parliamentary Request No. 9964/J (XXV.GP) of 11 July 2016 regarding "illegale Ausländerbeschäftigung in Tirol"* (9519/AB of 9 September 2016). Available at www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_09519/imfname_558284.pdf (accessed on 21 October 2016).

⁵⁷ Interview with Wilfried Lehner, financial police, 21 December 2016.

⁵⁸ Ibid.

⁵⁹ Interview with Heinz Kutrowatz, Federal Ministry of Labour, Social Affairs and Consumer Protection, 19 December 2016; Interview with Wilfried Lehner, financial police, 21 December 2016.

⁶⁰ Interview with Wilfried Lehner, financial police, 21 December 2016.

Section 4: Sanctions for Employers

Explanatory Note

This section on sanctions for employers focuses on employment that is illegal because it is not in line with the Act Governing the Employment of Foreigners.⁶¹ For other sanctions that result, for example, from undeclared social insurance or underpayment please see the General Social Insurance Act⁶² and the Act to Combat Wage and Social Dumping.⁶³

Q10. For each of the listed **sanctions**, please elaborate whether this type of sanction is imposed in your (Member) State (Yes/No) and if Yes, please describe in which cases are these sanctions applied.

Sanctions for employers	<u>Irregularly staying and illegally working TCNs</u> <i>*Please indicate if this sanction is imposed in your (Member) State (Yes/No), and if yes in which cases</i> <i>** Please provide reference to the specific legal provisions</i>	<u>Regularly staying and illegally working TCNs</u> <i>*Please indicate if this sanction is imposed in your (Member) State(Yes/No), and if yes in which cases</i> <i>** Please provide reference to the specific legal provisions</i>
Fines (e.g. fines imposed per illegally hired employee)	Yes. See column at right. The employment of an irregularly staying minor or of a significant number ⁶⁴ of irregularly staying foreigners can even constitute a criminal offence and is punishable with a fine equivalent to up to 365 days' imprisonment (Art. 28c para 1 Act Governing the Employment of Foreigners). <i>This sanction is general and does not specifically apply to the employment of TCNs.</i>	Yes. Illegal employment of a foreigner is an administrative offence and is punishable with a minimum fine of EUR 1,000 per illegally hired employee (Art. 28 para 1 subpara 1 Act Governing the Employment of Foreigners). <i>This sanction is general and does not specifically apply to the employment of TCNs. No distinction is made between irregularly and regularly staying illegally working foreigners.</i>
Imprisonment of employers (<i>Please indicate the aggravating circumstances</i>)	Yes. See column at right. The employment of an irregularly staying minor or a significant number ⁶⁵ of irregularly staying foreigners is a criminal offence and is punishable with imprisonment of up to six months (Art. 28c para 1 Act Governing the Employment of Foreigners). In particularly serious cases of employment of irregularly staying foreigners (exploitation, human trafficking, significant number of foreigners for longer than one month), the employer can be punished with	Yes. The commercial employment of a significant number of illegally employed persons (i.e. organized illegal employment) is punishable with imprisonment of up to two years (Art. 153e Criminal Code). <i>This sanction is general and does not specifically apply to the employment of TCNs. No distinction is made between irregularly and regularly staying illegally working foreigners.</i> Aggravating circumstances considered in criminal offences specifically include: whether the employer has committed

⁶¹ FLG No. 218/1975, in the version of FLG I No. 113/2015.

⁶² FLG No. 189/1955, in the version of FLG II No. 260/2016.

⁶³ FLG I No. 44/2016.

⁶⁴ Ten persons or more may be considered a "significant number" (Lindmayr, 2012:72; see Supreme Court, 21 October 2008, 15 Os 116/08k).

⁶⁵ Ibid.

	<p>imprisonment of up to two years (Art. 28c para 2 Act Governing the Employment of Foreigners).</p> <p><i>These sanctions are general and do not specifically apply to the employment of TCNs.</i></p>	<p>several criminal offences of the same or a like nature or has continued the criminal act for an extended period of time, whether the employer has already been convicted of an offence based on the same harmful inclination, whether the employer has acted out of malice or cruelty, and whether the employer has taken advantage of the helplessness of another person (Art. 33 para 1 Criminal Code).</p>
Confiscation of financial gains (e.g. share of profit or revenue of the employer)	<p>In the case of an administrative offence such a sanction is generally not imposed (see Art. 17 Administrative Criminal Act⁶⁶).</p> <p>In the case of a criminal offence the criminal court can confiscate assets obtained through the criminal offence (Art. 20 Criminal Code).</p> <p><i>These sanctions are general and do not specifically apply to the employment of TCNs. No distinction is made between irregularly and regularly staying illegally working foreigners.</i></p>	See column at left.
Ineligibility for public contracts	<p>Yes.</p> <p>Employers can be excluded from tender procedures if they have been convicted of the illegal employment of foreigners (Art. 68 and 72 Federal Procurement Act⁶⁷).</p> <p><i>This sanction is general and does not specifically apply to the employment of TCNs. No distinction is made between irregularly and regularly staying illegally working foreigners.</i></p>	See column at left.
Temporary or definitive closure of company or worksite	<p>No.</p> <p>Such a sanction is generally not imposed. The illegal employment of foreigners is not one of the potential threats to public interest listed in Art. 74 para 2 Trade, Commerce and Industry Regulation Act,⁶⁸ and thus apparently does not represent grounds for a temporary or definitive closure of a company or worksite.</p>	See column at left.
Confiscation of equipment/property	<p>In the case of an administrative offence such a sanction is generally not generally imposed (see Art. 17 Administrative Criminal Act).</p>	See column at left.

⁶⁶ FLG No. 52/1991, in the version of FLG I No. 33/2013.

⁶⁷ FLG I No. 17/2006, in the version of FLG II No. 250/2016.

⁶⁸ FLG No. 194/1994, in the version of FLG I No. 82/2016.

	<p>In the case of a criminal offence the criminal court can confiscate assets obtained through the criminal offence (Art. 20 Criminal Code).</p> <p><i>This sanction is general and does not specifically apply to the employment of TCNs. No distinction is made between irregularly and regularly staying illegally working foreigners.</i></p>	
Suspension of activity	<p>Yes.</p> <p>Persons who were convicted by a court for organized illegal employment or who were sentenced to a term of imprisonment of more than three months or to a fine equivalent to more than 180 days' imprisonment (e.g. for the employment of irregularly staying foreigners) and whose conviction has not been deleted from the record are excluded from pursuing a business (see Art. 13 para 1 Trade, Commerce and Industry Regulation Act).</p> <p><i>This sanction is general and does not specifically apply to the employment of TCNs. A distinction between irregularly and regularly staying illegally working foreigners is not made in every case.</i></p>	See column at left.
Withdrawal of trading license/disbarment of activity	<p>Yes.</p> <p>Such a sanction can be imposed for example if the person holding the business licence falls under the exclusion grounds specified in Art. 13 para 1 (see above) and if that individual could conceivably commit the same or a similar criminal offence while pursuing the business. It can also be imposed if, after committing a serious infringement such as illegal employment, the business licence-holder does not meet the reliability requirements for pursuing a business (see Art. 87 para 1 subpara 1 in conjunction with Art. 13 para 1 and Art. 87 para 1 subpara 3 Trade, Commerce and Industry Regulation Act).</p> <p><i>This sanction is general and does not specifically apply to the employment of TCNs. No distinction is made between irregularly and regularly staying illegally working foreigners.</i></p>	See column at left.
Withdrawal of residence permit if the employer is a TCN	<p>No.</p> <p>Such a sanction is generally not imposed</p>	See column at left.

	(see Art. 28 para 5 Residence and Settlement Act ⁶⁹). However, the employer can be issued a return decision under certain circumstances (see below).	
Other sanctions	<p>Ineligibility for a work permit:</p> <p>An employer who repeatedly employed foreigners illegally during the previous 12 months cannot be granted any work permit for a foreign worker (Art. 4 para 1 subpara 5 Act Governing the Employment of Foreigners). Pursuant to Art. 28 Act Governing the Employment of Foreigners, the conviction need not be final (Deutsch/Nowotny/Seitz, 2014:246).</p> <p>Prohibition of the employment of foreigners:</p> <p>An employer can be prohibited from employing foreigners for the duration of one year if that individual was convicted of the illegal employment of foreigners with final and binding effect three times during the previous two years (Art. 30 Act Governing the Employment of Foreigners).</p> <p>Ineligibility for public funding:</p> <p>Employers can be excluded from public funding and can be required to reimburse previously received public funding if they are repeatedly convicted of illegally employing more than three foreigners with final and binding effect (Art. 30b Act Governing the Employment of Foreigners).</p> <p><i>These sanctions are general and do not specifically apply to the employment of TCNs. No distinction is made between irregularly and regularly staying illegally working foreigners.</i></p> <p>Return decision:</p> <p>A return decision can be issued against an employer who is a TCN if that person's stay is contrary to public interests (Art. 52 para 4 Aliens Police Act⁷⁰). Whether this criteria is met has to be examined on a case-by-case basis. The illegal employment of TCNs could constitute grounds for assuming that the employer's stay is contrary to public interests.⁷¹</p>	See column at left.

⁶⁹ FLG I No. 100/2005, in the version of FLG I No. 122/2015.

⁷⁰ FLG I No. 100/2005, in the version of FLG I No. 24/2016.

⁷¹ See Administrative High Court, 11 May 2010, 2008/22/0845.

Q11a. Do the procedures differ if the employer did not **intentionally hire irregular workers**? How is this established?

An employer acting at least negligently can only be punished for an administrative offence (Art. 5 para 1 Administrative Criminal Act), whereas only an employer acting intentionally can be punished under criminal law (Art. 7 para 1 Criminal Code). According to the financial police, the grounds of intent as specified in Art. 5 Criminal Code are established based on the circumstances and history.⁷²

Q11b. What happens if the **residence permit of the employee** was revoked?

Only an employer who acts negligently or intentionally can be punished (see Q11a). Accordingly, if the residence permit of the employee was revoked, the sanctions imposed on the employer depend on whether the employer acted knowingly or could be held accountable for knowing of the potential offence.

Q12a. Does legislation in your (Member) State provide for criminal sanctions for: a/b/c/d/e (as per Art. 9 para 1 of the **Employers' Sanctions Directive (2009/52/EC)**)⁷³ or domestic equivalent?

Criminal sanctions for employers	Description <i>*Please indicate if this sanction is imposed in your (Member) State, and if yes in which cases</i> <i>** Please provide reference to the specific legal provisions</i>
(a) the infringement continues or is persistently repeated	Yes. Employing a significant number of irregularly staying foreigners for more than one month is a criminal offence (Art. 28c para 2 subpara 3 Act Governing the Employment of Foreigners).
(b) the infringement is in respect of the simultaneous employment of a significant number of illegally staying third-country nationals	Yes. Employing an irregularly staying minor or a significant number⁷⁴ of irregularly staying foreigners is a criminal offence (Art. 28c para 1 Act Governing the Employment of Foreigners).
(c) the infringement is accompanied by particularly exploitative working conditions	Yes. Employing an irregularly staying foreigner under particularly exploitative working conditions is a criminal offence (Art. 28c para 2 subpara 1 Act Governing the Employment of Foreigners).
(d) the infringement is committed by an employer who, while not having been charged with or convicted of an offence established pursuant to Framework Decision 2002/629/JHA, ⁷⁵ uses work or services exacted from an illegally staying third-country national with the knowledge that he or she is a victim of trafficking in human beings	Yes. Where an irregularly staying foreigner is forced to perform work or services and the employer makes use of that person's work or services under the knowledge that the person is a victim of trafficking in human beings , the employer commits a criminal offence (Art. 28c para 2 subpara 2 Act Governing the Employment of Foreigners).

⁷² Interview with Wilfried Lehner, financial police, 21 December 2016.

⁷³ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24.

⁷⁴ Ten persons or more may be considered a "significant number" (Lindmayr, 2012:72; see Supreme Court, 21 October 2008, 15 Os 116/08k).

⁷⁵ Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA), OJ L 203/1.

(e) the infringement relates to the illegal employment of a minor	<p>Yes.</p> <p>Employing an irregularly staying minor or a significant number of irregularly staying foreigners is a criminal offence (Art. 28c para 1 Act Governing the Employment of Foreigners).</p>
-------------------------------------------------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

Q12b. Has your Member State **amended legislation on sanctions** for illegally employed TCNs since July 2014⁷⁶? If so, please provide details.

No, the provisions implementing the Employers' Sanctions Directive (2009/52/EC) have not changed since.⁷⁷

Q13. What are the **strengths and weaknesses** in sanctioning employers who illegally employed TCNs in your (Member) State? What good practices can be identified in your (Member) State in the area of sanctions for employers? What were the particular success factors with measures that can be identified as **good practices**? Please reference the sources of the information provided.

According to the Federal Ministry of Labour, Social Affairs and Consumer Protection, the strength of sanctions for employers in Austria lies in the rather severe penalties, which have a deterrent effect, especially in combination with the inspections carried out by the financial police (see Section 3).⁷⁸

This strength in sanctioning employers refers to illegally employing foreigners in general and is not specific to TCNs.

A weakness of some of the sanctions (specifically "ineligibility for a work permit" and "prohibition of the employment of foreigners"; see Q4a) is that they can indirectly affect the person who was illegally employed, even where the responsibility for illegal employment does not lie with the employee. Namely, in such cases the employer is banned for one year from legally employing the former, illegal employee (see Art. 4 para 1 subpara 5 and Art. 30 Act Governing the Employment of Foreigners). In the experience of UNDOK, a foreigner who was employed illegally is denied access to the labour market by the Public Employment Service for one year.⁷⁹

This weakness in sanctioning employers mainly concerns illegally employed TCNs but also affects citizens from the EU Member State Croatia.⁸⁰

⁷⁶ The European Commission issued an implementation report on the Employers' Sanctions Directive on 22 May 2014. This EMN study aims to examine whether, and if so to what extent, new legislation or practices have arisen since that date.

⁷⁷ Interview with Heinz Kutrowatz, Federal Ministry of Labour, Social Affairs and Consumer Protection, 19 December 2016.

⁷⁸ Ibid.

⁷⁹ Interview with Sandra Stern, Drop-in Centre for Undocumented Workers (UNDOK), 16 December 2016.

⁸⁰ Transitional regulations are in place, restricting the labour market access of Croatian citizens (Public Employment Service, *Informationen zur Ausländerbeschäftigung: Arbeitsmarktzugang für kroatische Staatsbürger/innen – Übergangsregelungen bis längstens 30.06.2020*. Available at www.ams.at/docs/001_Neue_EU-Buerger_08.pdf (accessed on 21 October 2016)).

Section 5: Outcomes for Third-Country Nationals Found to be Working Illegally

Q14. In the event that an **irregularly** staying and illegally working third-country national (TCN) is detected, please describe in which situations s/he:

Q14a. *is issued with a return decision. Please also describe the procedure after an illegally employed TCN is detected and how is this communicated to immigration authorities.*

A return decision can be issued against a TCN staying unlawfully within Austrian territory (Art. 52 para 1 Aliens Police Act⁸¹) but might not be admissible if it interferes with the TCN's private or family life (Art. 9 Federal Office for Immigration and Asylum Procedures Act⁸²).

An irregularly staying and illegally working TCN who is detected can be arrested immediately by the financial police and transferred to the aliens police or the nearest security services (Art. 26 para 4 Act Governing the Employment of Foreigners⁸³).

Q14b. *is granted a period for voluntary departure*

If a return decision is issued, usually a period of 14 days is granted for voluntary departure (Art. 55 Aliens Police Act).

Q14c. *has received an entry ban*

An entry ban for up to five years can be issued where the TCN is detected to be working illegally (Art. 53 para 2 subpara 7 Aliens Police Act).

Q14d. *is fined (Please elaborate on the different types of sanctions in place)*

Foreigners cannot be fined for being illegally employed (see Deutsch/Nowotny/Seitz, 2014:507) but only for staying irregularly. The irregular stay of a foreigner is an administrative offence and is punishable with a minimum fine of EUR 500. Where the fine is uncollectible, the foreigner can be punished with imprisonment of up to two weeks (Art. 120 para 1a Aliens Police Act).

Q14e. *is detained (Please also describe which authorities have the right to detain illegally employed TCNs)*

Foreigners cannot be detained on account of illegal employment (see Deutsch/Nowotny/Seitz, 2014:507). They can, however, be arrested and detained provided that such action is necessary to secure a procedure terminating residence or to guarantee removal if they are likely to abscond and if the detention is proportionate (Art. 76 para 1 and 2 Aliens Police Act; see above Q14a).

Pursuant to Art. 76 Aliens Police Act, the Federal Office for Immigration and Asylum can order detention to be imposed (EMN, 2015a:5).

Q14f. *receives work permit*

An employer cannot be granted a work permit for a foreigner or TCN whose stay is irregular (see Art. 4 para 1 subpara 1 Act Governing the Employment of Foreigners). The employee can, however, be granted a humanitarian residence title for exceptional circumstances (see Q14g) and subsequently a work permit as well (Art. 54 para 1 subparas 2 and 3 Asylum Act; Art. 4 para 1 subpara 1 Act Governing the Employment of Foreigners).

⁸¹ FLG I No. 100/2005, in the version of FLG I No. 24/2016.

⁸² FLG I No. 87/2012, in the version of FLG I No. 25/2016.

⁸³ FLG No. 218/1975, in the version of FLG I No. 113/2015.

Q14g. *receives residence permit*

A TCN can be issued a humanitarian residence title for exceptional circumstances, in particular: if this is necessary due to the human right to private and family life, if that person has been a resident of Austria for at least five years and a legal resident for at least half that time, if the TCN has been accorded tolerated stay for at least a year, if this is necessary for the prosecution of criminal offences (in particular human trafficking), or if this is necessary to protect that person against further violence (Art. 54 ff. Asylum Act;⁸⁴ for more details please see AT EMN NCP, 2015:54–56).

Q14h. *Please indicate outcomes if identified as a victim of trafficking of human beings*

A Residence Permit for Individual Protection can be granted to a person who is a victim of trafficking in human beings or of forced prostitution and where related criminal or civil proceedings are pending (Art. 57 para 1 subpara 2 Asylum Act).

Q14i. *Other sanctions/outcomes*

n/i

Q15. In the event that a **regularly** staying and illegally working TCN is detected, please describe in which cases:

Q15a. *s/he can lose their residence rights*

A regularly staying TCN can be issued a return decision (thereby terminating the person's residence rights), if the TCN's stay is contrary to public interests (Art. 52 para 4 Aliens Police Act). According to a ruling by the Austrian Administrative High Court, illegal employment implies in principle that the stay of the person concerned is contrary to public interests.⁸⁵ Likewise, the TCN's residence title will probably not be renewed if the person has worked in Austria illegally (see Art. 24 in conjunction with Art. 11 para 1 subpara 1 Settlement and Residence Act⁸⁶).

Q15b. *the illegal work is tolerated or regularized*

If the regularly staying TCN would require a work permit⁸⁷ in order to perform that work legally, the illegal work cannot be regularized. This is particularly because, in order for an employer to be granted a work permit for a future employee, employment must not have already started (see Art. 4 para 1 subpara 4 Act Governing the Employment of Foreigners). Also, if during the previous 12 months the employee worked repeatedly without a work permit and is accountable for being employed illegally⁸⁸ or if during the previous 12 months the employer repeatedly employed foreigners illegally, no work permit can be granted (Art. 4 para 1 subpara 3 and 5 Act Governing the Employment of Foreigners).

Other regularly staying TCNs who do not require a work permit have a residence permit that either (a) grants them access to the labour market or (b) excludes the possibility of being employed (Deutsch/Nowotny/Seitz, 2014:217). In case (a) the TCN is allowed to pursue employment as defined in the residence permit. In case (b) the TCN is not allowed to work at all. Accordingly, the work can only be regularized by obtaining a residence title that includes labour market access.

⁸⁴ FLG I No. 100/2005, in the version of FLG I No. 24/2016.

⁸⁵ Administrative High Court, 11 May 2010, 2008/22/0845.

⁸⁶ FLG I No. 100/2005, in the version of FLG I No. 122/2015.

⁸⁷ TCN who require a work permit include pupils, students, seasonal workers, posted workers, rotation workers, holders of a Temporary Residence Permit – Family Community, temporarily employed artists, asylum seekers, holders of a Residence Permit and a Residence Permit for Individual Protection, tolerated stay, relatives of EU citizens, and Turkish citizens working according to the Association Agreement. But also skilled workers in shortage occupations and other key workers have to fulfil the requirements laid down in Art. 4 para 1 subpara 2–9 Act Governing the Employment of Foreigners (Deutsch/Nowotny/Seitz, 2014:217, 355 and 361).

⁸⁸ A final conviction according to Art. 28 Act Governing the Employment of Foreigners is not required (Deutsch/Nowotny/Seitz, 2014:245).

Q15c. *s/he is fined*

n/a

Q15d. *s/he is detained*

See Q14e.

Q15e. *s/he is issued a return decision*

A return decision can also be issued against TCNs staying regularly within Austrian territory if that person's stay is contrary to public interests (see Art. 52 para 4 Aliens Police Act, see Q15a). Such a return decision is not admissible, however, if it leads to a violation of the TCN's private or family life (Art. 9 Federal Office for Immigration and Asylum Procedures Act).

Q15f. *Other sanctions/outcomes*

Contract becomes invalid:

If the illegally employed foreigner has a work contract but not the required work permit, then the contract becomes invalid (Art. 879 para 1 General Civil Code;⁸⁹ Lindmayr, 2012:71).

Q16. What are the consequences for TCNs who have temporary or permanent residence permit in one EU country and are illegally employed in your (Member) State?

A person who is residing in Austria irregularly has to leave without delay and return to the Member State for which the person holds a residence title. If the person does not comply and the person's departure is necessary for reasons of public peace or order, the authorities are required to issue a return decision (Art. 52 para 6 Aliens Police Act).

If the person is residing in Austria legally, the same applies as to other regularly staying TCNs (see Q15).

Q17. Please describe the **possibility for compensation** of unpaid wages to the illegally working TCNs, i.e. back payment of the salary.⁹⁰

Q17a. In the event that back payment of salaries, social security contributions and income taxes are due in favour of the illegally employed TCN, please describe mechanisms in place which provide for the **liability of the employer to pay**:

(i) Outstanding remuneration;

(ii) Amount equal to taxes and social security contributions (which is due to the State and not the TCN).

Where, contrary to the provisions of the Act Governing the Employment of Foreigners, foreigners are employed without a work permit, pursuant to Art. 29 para 1 Act Governing the Employment of Foreigners they nonetheless have for the duration of employment the same entitlements towards their employers as under a valid employment contract. This includes, in particular, the right to payment of outstanding remuneration (Deutsch/Nowotny/Seitz, 2014:529). The employer is correspondingly required to pay the Federal State income taxes and social security contributions.⁹¹ Unless proven otherwise it is assumed that employment lasted at least three months (Art. 29 para 1 Act Governing the Employment of Foreigners).

No distinction is made between TCNs and other foreigners.

⁸⁹ JLC No. 946/1811, in the version of FLG I No. 43/2016.

⁹⁰ "Back payment" means any outstanding remuneration and any outstanding taxes and social security contributions that the employer should pay to the TCNs for the work which they have undertaken (recital 14 Directive 2009/52/EC).

⁹¹ Interview with Heinz Kutrowatz, Federal Ministry of Labour, Social Affairs and Consumer Protection, 19 December 2016.

Q17b. Does your national legislation foresee that, in addition to employers, **direct contractors and any intermediate subcontractors** may also be required to pay any outstanding remuneration and taxes?

Where a company contracting out services does not comply with its duty of inquiry/notification as laid down in Art. 26 para 6 Act Governing the Employment of Foreigners, or where that company knowingly tolerates the illegal employment of foreigners by a contractor, the company is liable – but only as deficiency guarantor – for any wage claims that employees hold against any (sub-) contractor (Art. 29a Act Governing the Employment of Foreigners). In addition to the (sub-) contractor, the company is also to be prosecuted for the illegal employment of foreigners (Art. 28 para 6 Act Governing the Employment of Foreigners; see Section 4).

Where an employee is leased to another entrepreneur, that entrepreneur can be held liable for outstanding remuneration and outstanding social insurance contributions (Art. 14 Temporary Employment Act⁹²).

Q17c. Please provide comments on **difficulties** encountered or success factors with measures that can be identified as **good practices** in relation to claims for back payments.

In Austria, the presumed three-months existence of an employment relationship, which is aimed at facilitating the collection of outstanding salaries (see Q17a), applies not only to irregular staying illegally employed TCNs as specified in Art. 6 para 3 of the Employers' Sanctions Directive (2009/52/EC)⁹³ but to all foreigners who work illegally. This provision was identified as a good practice during the implementation of the project "For Undocumented Migrants' Rights in Central Europe" (Stübik, 2014:66).

Q17d. In addition to back-payment, can employer be ordered to cover **other expenses**, such as payment of living expenses (please define how living expenses are defined/ calculated) and cost of return of illegally employed TCNs?

Yes. Where the employer is responsible for illegally employing workers, the foreigners employed without a work permit have the same entitlements in the way of terminating the contract with their employer as under a valid employment contract, which includes the notice period (see Art. 29 para 2 Act Governing the Employment of Foreigners). This means that the formerly illegally employed foreigner is entitled to benefits such as bonus payments or compensation payments for unused annual leave accrued until the end of the notice period. This includes compensation for in-kind benefits such as company housing (Vienna Chamber of Labour/UNDOK, 2014:10–11). The provisions regarding special protection against dismissal (e.g. for pregnant women or parents during parental leave) do not apply (see Art. 29 para 2 Act Governing the Employment of Foreigners; Vienna Chamber of Labour/UNDOK, 2014:11–12).

Where a foreigner has been employed without a work permit, the employer has to pay for the international money transfer of the outstanding remuneration (Art. 20 Act Governing the Employment of Employees).

No distinction is made between TCNs and other foreigners.

Q18a. Does the legislation in your (Member) State foresee the **right of illegally employed TCNs to make a claim** against employers including in cases in which they have, or have been, returned?

Yes. In particular, where foreigners are employed without a work permit, they have the same entitlements towards their employer as under a valid employment contract (see Art. 29 para 1 Act Governing the Employment of Foreigners).

When making a claim, the relevant limitation periods and expiry periods have to be taken into account. In civil law a general limitation period of three years applies to financial claims arising from an employment contract. After three years it is no longer possible to obtain a judicial determination of a claim, for example, to back payment of a salary (see for example Art. 7i para 7 Employment Contract Law Adaptation Act⁹⁴).⁹⁵ Furthermore, claims to

⁹² FLG No. 196/1988, in the version of FLG I No. 44/2016.

⁹³ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24.

⁹⁴ FLG No. 459/1993, in the version of FLG I No. 44/2016.

⁹⁵ Hepl.gv.at, *Begriffslexikon* >> *Verjährung*. Available at www.help.gv.at/Portal.Node/hlpd/public/content/99/Seite.991339.html (accessed on 12 December 2016).

compensation resulting from contract termination must be asserted within a period of six months (see for example Art. 34 para 1 Employees Act⁹⁶). A shorter period of three to six months is often stipulated in collective agreements or employment contracts. On expiration of this period the entitlement lapses.⁹⁷

Q18b. If the answer is positive, **is it a specific claim**, or does it fall under general provisions concerning the right to bring a case before civil or labour courts?

This is largely a specific claim (see Q18a).

Q18c. May third parties with legitimate interest **act on behalf or in support of TCN** in relevant administrative or civil proceedings (e.g. trade unions, organisation of migrant workers, public authorities)?

Yes. In civil proceedings before the Austrian labour courts, (former) employees may be represented by specified organizations (see Art. 40 Labour and Social Courts Act⁹⁸). Such organizations are, for example, the Chamber of Labour or trade unions.⁹⁹

Q18d. Please provide comments on **difficulties** encountered or success factors with measures that can be identified as **good practices**.

According to the financial police, making a valid claim is a challenge. First of all because illegal employees are often reluctant to testify against their employers. In addition, as UNDOK observes, it is often difficult for them to obtain evidence because they are under pressure due to their risk of exploitation and are vulnerable to blackmail. Therefore, any evidence that illegal employees do provide is usually not in the form of a record or statement that would be admissible as evidence in proceedings.¹⁰⁰ Furthermore, making a personal statement in court often poses a challenge for illegally employed TCNs (and in particular for those whose stay is irregular). According to UNDOK, personal testimony represents a barrier due to the TCN's uncertain residence status.¹⁰¹

Another difficulty derives from the fact that, due to certain limitation and expiry periods often lasting only a few months, employees have to act quickly when claiming their entitlements (see Q18a). But UNDOK observes that because illegally employed foreigners are usually not aware of their rights and these regulations, their entitlements based on labour law often expire before they have the chance to claim them (UNDOK, 2016:15).

Access to legal representation can also be a challenge. The Austrian Trade Union Federation, for example, usually provides legal support only after six months of membership. However, several trade unions¹⁰² have agreed to provide special legal protection for illegally employed foreigners (UNDOK, 2016:16).

These difficulties and good practices concern (unless stated otherwise) illegally employed foreigners in general and are not specific to TCNs.

Q19a. Does your (Member) State provide for **information to illegally employed TCNs on their rights**?

If Yes, is this foreseen in legislation, or else is it a part of general administrative guidelines or practices?

Please provide comments on **difficulties** encountered or success factors with measures that can be identified as **good practices** in relation to information obligations.

⁹⁶ FLG No. 292/1921, in the version of FLG I No. 152/2015.

⁹⁷ Economic Chamber of Carinthia, *Verjährung und Verfall*. Available at www.wko.at/Content.Node/Service/Arbeitsrecht-und-Sozialrecht/Arbeitsrecht/Dienstverhaeltnis/Aufloesung/Verjaehrung_und_Verfall.html (accessed on 12 December 2016).

⁹⁸ FLG No. 104/1985, in the version of FLG I No. 44/2016.

⁹⁹ Interview with Sandra Stern, Drop-in Centre for Undocumented Workers (UNDOK), 16 December 2016.

¹⁰⁰ Interview with Wilfried Lehner, financial police, 21 December 2016; UNDOK, *Politische Forderungen*. Press release, 7 September 2015, available at https://undok.at/wp-content/uploads/2015/09/UNDOK-Anlaufstelle_Politische-Forderungen.pdf (accessed on 29 December 2016).

¹⁰¹ UNDOK, *Politische Forderungen*. Press release, 7 September 2015, available at https://undok.at/wp-content/uploads/2015/09/UNDOK-Anlaufstelle_Politische-Forderungen.pdf (accessed on 29 December 2016); Interview with Sandra Stern, Drop-in Centre for Undocumented Workers (UNDOK), 16 December 2016.

¹⁰² For a list of the respective sectoral trade unions see UNDOK, *Verband*. Available at <https://undok.at/de/verband/> (accessed on 7 December 2016).

Yes. The Federal Ministry of Labour, Social Affairs and Consumer Protection partially funds the Drop-in Centre for Undocumented Workers (UNDOK)¹⁰³ for one year periods. Further funding is provided by the Vienna Chamber of Labour and several trade unions. UNDOK provides information in various languages about labour market access, labour law and social rights through its website, information materials and through individual counselling free of charge. Furthermore, UNDOK supports illegally employed foreigners in claiming their rights. These services are provided to foreigners (and in particular to TCNs) without residence titles and/or work permits (UNDOK, 2016). UNDOK has its office in Vienna but also provides its services to a certain extent in other parts of Austria, for example through e-mail counselling, via telephone or through workshops.¹⁰⁴ In addition, the financial police distribute leaflets to address irregular employees, informing them about their labour rights and legal options under Austrian labour law. If the Public Employment Service is contacted by an irregular employee, s/he is handed out a leaflet informing about his/her rights. The work permit and the copy thereof also contain a short information on labour rights.¹⁰⁵

Despite the available information offerings, UNDOK notes that a general lack of knowledge and even incorrect information continue to exist on the rights of illegally employed foreigners, not only among the foreigners themselves but also among institutions, and this situation leads to difficulties. Further challenges in informing illegally employed foreigners about their rights arise from the language barrier, UNDOK reports. Such difficulties can be overcome, however, by providing counselling in various languages and through interpreters. Also, due to the precarious situation of illegally employed foreigners and the risk they run of losing their residence rights, it is a challenge to establish trust in counselling situations.¹⁰⁶

Q19b. Have any of measures referred to under questions 17-19 been **introduced in your legislation after July 2014**¹⁰⁷? If yes, which ones?

No, the provisions implementing the Employers' Sanctions Directive (2009/52/EC) have not changed since.¹⁰⁸

Q20. What **good practices** can be identified in your (Member) State in the area of outcomes for illegally employed TCNs (sanctions and other outcomes)? What were the particular success factors with measures that can be identified as good practices? Please reference the sources of the information provided.

Desk research and expert interviews did not reveal any particular good practices in the area of outcomes for illegally employed TCNs.

Q21. Case studies

*In order to better understand the different procedures used when authorities detect illegal employment of third-country nationals (TCNs), five hypothetical case studies have been designed. It is recognized that outcomes for TCNs may largely differ depending on their particular situation. In this respect, the case studies will help to illuminate the elements which exist for national authorities to use discretion in response to this. For each of the case studies below, please describe the general procedure **after detecting illegal employment** and the consequences in your (Member) State for the third-country national. In order to determine the procedure and the consequences in accordance with the rules of your Member State, additional information about the particular circumstances of each case may be required. EMN NCPs are asked to identify the different circumstances relevant for each case.*

The general procedure:

When the financial police detect a case of illegal employment (i.e. an infringement of Art. 28 Act Governing the Employment of Foreigners), this is immediately reported to the responsible administrative penal authorities and charges are filed against the employer. Particularly serious cases involving illegal employment of foreigners (i.e.

¹⁰³ UNDOK - Anlaufstelle zur gewerkschaftlichen Unterstützung UNDOKumentiert Arbeitender, <https://undok.at/> (accessed on 28 November 2016).

¹⁰⁴ UNDOK, *Information Workshop in the framework of the 6th Vienna Integration Week*, 17 May 2016, VHS Ottakring.

¹⁰⁵ Interview with Heinz Kutrowatz, Federal Ministry of Labour, Social Affairs and Consumer Protection, 19 December 2016.

¹⁰⁶ Interview with Sandra Stern, Drop-in Centre for Undocumented Workers (UNDOK), 16 December 2016.

¹⁰⁷ The European Commission issued an implementation report on the Employers' Sanctions Directive on 22 May 2014. This EMN study aims to examine whether, and if so to what extent, new legislation or practices have arisen since that date.

¹⁰⁸ Interview with Heinz Kutrowatz, Federal Ministry of Labour, Social Affairs and Consumer Protection, 19 December 2016.

infringements of Art. 28c Act Governing the Employment of Foreigners) are reported to the public prosecutor's office (Deutsch/Nowotny/Seitz, 2014:508, 526).¹⁰⁹

Q21a. A third-country national residing and working irregularly

Mr Adawe Shire, a 38 years-old carpenter from Somalia entered your (Member) State via irregular means with his wife and 2-year old daughter. They have been in the (Member) State for three years. Mr Shire has been working without an employment contract at a construction company as a general construction worker. Now he has found a job in his profession and would like to sign a contract and apply for a legal residence permit. (a) What happens after the labour inspectorate detected irregularities on a random control? What are the consequences for him? (b) If Mr Shire is not detected but he is offered a new job with a written contract can his situation be regularized?

(a) In addition to the general procedure (see Q21) the financial police are authorized to arrest the irregularly staying TCN if imminent danger exists. If they arrest the TCN, the financial police have to immediately transfer the foreigner to the aliens police or the nearest security services (Art. 26 para 4 Act Governing the Employment of Foreigners).

In general, a return decision can be issued against Mr Shire, he being a TCN staying irregularly in Austria (see Art. 52 para 1 Aliens Police Act). A return decision is not admissible if it violates Mr Shire's right to private or family life. While having a wife and daughter in Austria may be in his favour, the fact that he was detected working illegally (which is an infringement of public order) could be to his disadvantage (see Art. 9 para 2 Federal Office for Immigration and Asylum Procedures Act).

(b) Mr Shire could apply for international protection. If granted international protection, he would be entitled to take up employment in Austria (Art. 1 para 2 lit a Act Governing the Employment of Foreigners). Mr Shire could alternatively apply for a Red-White-Red Card for skilled workers in shortage occupations. However, the profession of "construction worker" is currently not listed as a shortage occupation (see Art. 1 of the Regulation for Skilled Workers 2017¹¹⁰). Finally, Mr Shire could apply for a humanitarian residence title for exceptional circumstances for reasons of Art. 8 European Convention on Human Rights (Art. 55 Asylum Act). If granted such a title, he could take up legal employment (Art. 54 para 1 Asylum Act).

Q21b. A third-country national on a student permit employed more hours than allowed

Ms Svitlana Ivanenko, a student holding Ukrainian citizenship, aged 22, moved to your (Member) State one year ago. Svitlana is enrolled in a two year master's programme at university. She holds a residence permit for students. For the past six months she was also employed for 10 hours per week at a local café¹¹¹. During some months of the academic year as well as the summer break at university, Svitlana started to work longer hours at the café, leading to work of almost 45 hours per week during term time for 3 months without changes in her part-time student contract. What happens after the labour inspectorate detected that Svitlana was working 40 hours per week? Please specify the maximum hours per week that students are allowed to work in your (Member) State.

According to Austrian law, a work permit can be issued (without conducting a "labour market test") to TCNs holding a residence title for students, allowing them to be employed for 10 hours per week (in the case of Bachelor students)¹¹² or 20 hours (in the case of Master or PhD students) (Art. 4 para 7 subpara 7 Act Governing the Employment of Foreigners).

Ms Ivanenko would have needed a work permit including a prior labour market test in order to work 40 hours per week (see Art. 4 para 3 subpara 6 Act Governing the Employment of Foreigners). However, such extended work could have led to the assumption that the actual purpose of her residence is no longer in keeping with the title

¹⁰⁹ Interview with Wilfried Lehner, financial police, 21 December 2016.

¹¹⁰ FLG II No. 423/2016.

¹¹¹ Based on Directive 2016/801 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) allowing students to take up employment of at least 15 hours per week. IE and the UK are not participating in this Directive.

¹¹² The Federal Ministry of Labour, Social Affairs and Consumer Protection has proposed a new amendment of the Act Governing the Employment of Foreigners and the Settlement and Residence Act, which includes the increase of allowed working hours for Bachelor students to 20 hours per week (Parliament of the Republic of Austria, *Ministerial Proposal – Legislative Text: Draft*, available at www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00275/fname_574531.pdf (accessed on 8 February 2017)). The amendment has not yet been adopted.

issued to her (see Art. 64 para 2 Residence and Settlement Act). This could pose difficulties when renewing her residence title (Vienna Chamber of Labour/UNDOK, 2014:23).

After Ms Ivanenko is detected working 40 hours per week without a work permit, a return decision can be issued even if she is staying regularly in Austria (see Art. 52 para 4 Aliens Police Act; see Q15a). Such a return decision is not admissible if it constitutes a violation of her right to private or family life (see Art. 9 para 2 Federal Office for Immigration and Asylum Procedures Act), which according to the available information is probably not the case with Ms Ivanenko.

Q21c. A third-country national who resided and worked regularly, but whose permit has expired

Jiao Bao, a 33 years old web designer from China arrived in your Member State two years ago through a temporary residence permit arranged through an IT company that employed her. She lost her job and found a job in a local bar for which she was not authorized by her residence permit. After four months of working in the local bar, she applies for a job at another IT company and receives a job offer. However, in the meantime she was detected by the labour inspectorate of working irregularly in the local bar. What happens after the detection taking into consideration that she holds a job offer?

Assuming that the temporary residence title was attached to the work at the IT company which originally employed Ms Bao, her employment at the local bar is illegal. Any other employment (for example at the IT company offering her a job) would also be illegal without the necessary work permit. In addition, Ms Bao might have to pay a fine between EUR 50 and EUR 250 because she failed to notify the immigration authorities of the change of purpose of her stay and took action not covered by her residence title (Art. 77 para 1 Settlement and Residence Act).

After being detected, a return decision could be issued against Ms Bao, in particular because her illegal employment was contrary to public interests (see Art. 52 para 4 Aliens Police Act; see Q15a). Such a return decision is not admissible if it constitutes a violation of her right to private or family life (see Art. 9 para 2 Federal Office for Immigration and Asylum Procedures Act), which according to the available information is probably not the case with Ms Bao.

Q21d. A third-country national present as a tourist

Marija Bogdanovic, a Serbian citizen, aged 45 has entered your (Member) State as a tourist one month ago. Due to visa liberalization for the Western Balkans countries, Marija has the right to remain in your (Member) State for up to 90 days per six-month period as a tourist without requiring a visa¹¹³. During her stay in your (Member) State, Marija has been working for a family she met through friends as a housekeeper and babysitter. She has been living with the family and has been paid cash for her work. After two months the family asks Marija to stay and work for them full time. They offered to grant her a work contract and asked her to apply for a residence permit. Marija intends to apply for a residence permit in your (Member) State during the 90 days period she enjoys visa liberalization. However, Marija is detected by the authorities in your (Member) State before applying for the permit. What would be the consequence for Marija?

The type of residence status that Ms Bogdanovic enjoys due to visa liberalization does not allow her to take up employment (Art. 3 para 2 Act Governing the Employment of Foreigners; Peyrl/Neugschwendtner/Schmaus, 2015:23). Therefore, a return decision could be issued against her, since she was illegally employed when she was detected by the authorities (Art. 52 para 4 subpara 1a Aliens Police Act; see Q15a). However, such a return decision is not admissible if it constitutes a violation of her right to private or family life (see Art. 9 Federal Office for Immigration and Asylum Procedures Act), which according to the available information is probably not the case with Ms Bogdanovic. In combination with a return decision, an entry ban for up to five years could be issued against her because she was detected to be working illegally (see Art. 53 para 2 subpara 7 Aliens Police Act).

Ms Bogdanovic might be allowed to apply for a residence permit within the country during her visa-free stay in Austria (Art. 21 para 2 subpara 5 Settlement and Residence Act). If a decision on her application is not taken within the 90 days of her visa-free stay, she has to leave the country (Peyrl/Neugschwendtner/Schmaus, 2015:24).

¹¹³ Based on the visa free travel decision adopted by the EU Member States on 30 November 2009 (European Commission, *Visa free travel for citizens of the former Yugoslav Republic of Macedonia, Montenegro and Serbia before Christmas*. Press release IP/09/1852, Brussels, 30 November 2009, available at http://europa.eu/rapid/press-release_IP-09-1852_en.htm?locale=fr (accessed on 23 January 2017)).

21e. A third-country national seasonal worker

Mr Karim Harrak, a 25 year old from Morocco entered your (Member) State as a seasonal worker for strawberry picking. He has been residing on a seasonal worker permit and is required to leave your (Member) State after the legally allowed duration for stay expired.¹¹⁴ The contract with his current employer is valid for six months. However, after his contract expired he remained in your (Member) State and took on another job in a hotel. He thus remained in your (Member) State longer than the legally allowed duration. After a few months in the second job, he applied again as a seasonal worker for strawberry picking. However, he is detected that he has overstayed in the country. What would be the consequences for Karim?

As a Moroccan national, Mr Harrak's stay in Austria was considered regular as long as his seasonal worker permit was valid (see Art. 31 para 1 subpara 6 Aliens Police Act). When he was detected, he was not only working illegally but also his stay was irregular. Therefore, a return decision can be issued against Mr Harrak (see Art. 52 para 1 Aliens Police Act). Such a return decision is not admissible, however, if it constitutes a violation of his right to private or family life (see Art. 9 para 2 Federal Office for Immigration and Asylum Procedures Act), which according to the available information is probably not the case with Mr Harrak.

In Austria, a work permit for seasonal work has to be applied for by the employer, while the future seasonal worker is not eligible to apply (Art. 19 Act Governing the Employment of Foreigners). Accordingly, only an employer could apply for another permit to allow Mr Harrak to work as a seasonal worker.

21f. A third-country national working for an international trading company

Mrs Awa Diop arrived from Senegal in your country illegally a year ago and has been working for an international trading company during that time irregularly ever since. For the last five months she has not been paid her salary by her employer. She decides to sue the company and to give up her false identity which the employer was aware of. What would be the consequence for Mrs Diop?

In general, a return decision can be issued against Mrs Diop who – as a TCN – is staying irregularly in Austria (see Art. 52 para 1 Aliens Police Act). A return decision is not admissible if it constitutes a violation of her private or family life (see Art. 9 Federal Office for Immigration and Asylum Procedures Act), which according to the available information is probably not the case with Mrs Diop.

Irrespective of the consequences for her residence status, Mrs Diop has the right to claim the payment of her outstanding salary: even if she was employed without a work permit, Mrs Diop has for the duration of the employment the same entitlements towards her employer as under a valid employment contract (see Art. 29 para 1 Act Governing the Employment of Foreigners).

¹¹⁴ Based on Directive 2014/36/EU – Seasonal workers – allowing third-country nationals to reside in a Member State between five months and nine months in any 12-month period. The permit is renewable. IE and the UK are not participating in this Directive.

Annexes

A.1 Statistical Annex

1. Inspections and sanctions for employers

The European Commission has collected data under the reporting requirements of the Employers' Sanctions Directive (2009/52/EC)¹¹⁵ impose on (Member) States.¹¹⁶

The following data are therefore available:

- ★ Number of inspections carried out by sector (and as percentage of the total number of employers in the sector)
- ★ Number of inspections which detected illegally staying third-country nationals (and as percentage of the total number of employees in each sector)
- ★ Sanctions, in particular how many proceedings have been opened following the inspections, how many have been closed and the total amount of the imposed fines
- ★ Criminal sanctions, in particular the number of prosecutions initiated following the inspections, the final decisions, the average duration of imprisonment imposed and the total sum of imposed fines

The statistics for 2015 has been made available on the IES in the Study folder: **EMN Outputs ->EMN studies ->.Illegal employment study - >Working Papers and Additional documents->Employer Sanctions Directive data**. EMN NCPs are encouraged to review the statistics and flag up any methodological issues or changes in the statistics. The Service Provider will make use of the statistics for the purposes of the Synthesis Report. EMN NCPs are also encouraged to use the statistics in the preparation of their national report.

Question A.1: Please provide statistics on a number of convictions for employing illegally staying TCNs for years 2014, 2015 and 2016, if possible broken down by specific criminal offences enlisted in Article 9.1. a-e of the Employers' Sanctions Directive (2009/52/EC), i.e.:

Convictions for employers	2014	2015	2016
Total number of convictions	n/i	n/i	n/i
(a) infringement continues or is persistently repeated	n/i	n/i	n/i
(b) infringement is in respect of the simultaneous employment of a significant number	n/i	n/i	n/i

¹¹⁵ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24.

¹¹⁶ IE and the UK do not participate in this Directive.

of illegally staying third-country nationals			
(c) the infringement is accompanied by particularly exploitative working conditions	n/i	n/i	n/i
(d) the infringement is committed by an employer who, while not having been charged with or convicted of an offence established pursuant to Framework Decision 2002/629/JHA, uses work or services exacted from an illegally staying third-country national with the knowledge that he or she is a victim of trafficking in human beings	n/i	n/i	n/i
(e) the infringement relates to the illegal employment of a minor	n/i	n/i	n/i

Question A.2: Please provide statistics on type and number of sanctions for employers in your (Member) State

Type of sanction for employers (please fill in)	2014	2015	2016
n/i	n/i	n/i	n/i

2. Scale and profiles of illegal employment of third-country nationals

Question A.3: Please provide statistics on a number of identified illegally employed TCNs. Please explain if any differences in the data provided here and the data under the reporting requirements on the Employers' Sanctions Directive (2009/52/EC) available on the EMN IES in [this folder](#).

Illegally employed TCNs	2014	2015	2016	Methodological notes
Number of cases of identified <u>illegally staying</u> and illegally employed TCNs	n/i	n/i	n/i	
Number of cases of identified <u>legally staying</u> and illegally employed TCNs	n/i	n/i	n/i	
TOTAL: Number of cases of identified illegally employed TCNs	3,436	3,142	4,003	The data was provided by the financial police as retrieved from their database. It refers to the number of TCNs presumed illegally employed as recorded in criminal complaints filed in that year.

Question A.4: Please provide statistics on the profiles of illegally employed TCNs in your (Member) State for 2015.

Illegally employed TCNs	Top 10 nationalities	Age disaggregation	Sex disaggregation	Methodological notes
Number of cases of identified <u>illegally staying</u> and illegally employed TCNs	n/i	n/i	n/i	
Number of cases of identified <u>legally staying</u> and illegally employed TCNs	n/i	n/i	n/i	
TOTAL: Number of cases of identified illegally employed TCNs	<ol style="list-style-type: none"> 1. Bosnia and Herzegovina; 2. Serbia; 3. Turkey; 4. UNSC resolution 1244-administered Kosovo; 5. former Yugoslav Republic of Macedonia; 6. China; 7. Egypt; 8. Ukraine; 9. Russian Federation; 10. Mongolia. 	n/i	Male: 2,524 Female: 618	The data was provided by the financial police as retrieved from their database. It refers to the number of TCNs presumed illegally employed as recorded in criminal complaints filed in that year.

3. Outcomes for third-country nationals

Question A.5: Please provide statistics on the outcomes of identified illegally employed TCNs.

Illegally employed TCNs	2014	2015	2016	Methodological notes
Number of residence and/or work permits issued to detected <u>illegally staying</u> and illegally working TCNs	n/i	n/i	n/i	
Number of residence and/or work permits issued to detected <u>legally staying</u> and illegally working TCNs	n/i	n/i	n/i	
Number of illegally employed TCNs who were granted a period for voluntary return	n/i	n/i	n/i	
Number of illegally employed TCNs who were given an order to leave the country following a labour inspection	n/i	n/i	n/i	
Number of illegally employed TCNs who were deported following an inspection	n/i	n/i	n/i	
Number of illegally employed TCNs who were identified as victims of trafficking in human beings	n/i	n/i	n/i	
Number of decisions obliging employers to pay back payments/ amount equal to taxes and social security contributions	n/i	n/i	n/i	

Question A.6: Please provide statistics on the types and number of sanctions for illegally employed TCNs

Type of sanctions available for illegally employed TCNs (e.g. fines, imprisonment, etc)	2014	2015	2016	Methodological notes
n/a	n/a	n/a	n/a	n/a

Question A.7: Number of complaints lodged against employers for employing illegally TCNs. Please provide any disaggregation/break down on the type of complaints if available – such as complaints lodged by third parties, complaints lodged by TCNs, etc.

Number of complaints	2014	2015	2016	Methodological notes

Total number of suspected illegally employed TCNs in criminal complaints	3,436	3,142	4,003	The data was provided by the financial police as retrieved from their database. It refers to the number of TCNs presumed illegally employed as recorded in criminal complaints filed in that year.
<i>Of which: infringement of General Social Insurance Act¹¹⁷</i>	1,192	958	815	
<i>Of which: infringement of Temporary Employment Act¹¹⁸</i>	165	152	299	
<i>Of which: infringement of Unemployment Insurance Act¹¹⁹</i>	101	87	85	
<i>Of which: infringement of Employment Contract Law Adaptation Act¹²⁰</i>	418	475	1,314	
<i>Of which: infringement of Act Governing the Employment of Foreigners¹²¹</i>	1,560	1,470	1,490	

Question A.8: Descriptive overview of the **profile of employers, including affected sectors** of labour market

According to the most recent study available on this issue (conducted by Jandl et al. in 2007), the Austrian sectors with the largest share of illegally employed foreigners relative to total sector employment are construction, catering and tourism, agriculture, and domestic care. These sectors and the employers belonging to them can be characterized as follows:

Construction is a labour-intensive sector characterized by international competition and a non-transparent structure for carrying out work (involving successive levels of subcontractors). In addition to companies, many private persons also employ foreigners illegally to perform construction activities. A common feature of both commercial and private employment is that illegal employees only have a verbal contract. The sector of **catering and tourism** is characterized by a substantial number of small- and medium-sized enterprises as well as flexible working hours, the latter feature making employment compatible with other jobs or obligations (such as university studies). Salaries or tips are often paid in cash. Not registering employees for social security or registering them at a pay level below the minimum threshold is common in this sector. The **agricultural sector** makes intensive use of seasonal employment which provides flexible and cheap labour. The sector is characterized by small-scale producers competing with those in other EU Member States, unstable working hours, difficult working conditions and intensive labour requirements. Irregularities in employment mainly relate to working hours, working between seasons and other violations of workers' rights. Another feature of agricultural work is that employees are accommodated on the farms. In the **domestic care sector** the private household is the workplace, which makes the employee permanently present and available in "live-in arrangements". The main forms of irregularities include extended working hours, violation of workers' rights, and the lack of registration. One of the reasons for employing foreign domestic care workers on an irregular basis are the low labour costs. According to Jandl et al., this is particularly true for 24-

¹¹⁷ FLG No. 189/1955, in the version of FLG II No. 260/2016.

¹¹⁸ FLG No. 196/1988, in the version of FLG I No. 44/2016.

¹¹⁹ FLG No. 609/1977, in the version of FLG I No. 31/2017.

¹²⁰ FLG No. 459/1993, in the version of FLG I No. 44/2016.

¹²¹ FLG No. 218/1975, in the version of FLG I No. 113/2015.

hour care provided in private households (Jandl et al., 2009:160, 168–169, 177–183).

Question A.9: Please provide any additional statistics and general observations on the availability of data and **methodology of available data**

The available data on illegal employment is based on the number of apprehensions resulting from inspections that were carried out by the financial police. Obviously, the number of cases in which illegally employed foreigners were apprehended (as well as their nationality, age and sex) is a reflection of the frequency of checks and priorities, and is influenced by access issues (including restricted access to private households).

A.2 List of Translations and Abbreviations

English term	English abbreviation	German term	German abbreviation
Act Governing the Employment of Foreigners	–	Ausländerbeschäftigungsgesetz	AuslBG
Act to Combat Wage and Social Dumping	–	Lohn- und Sozialdumping-Bekämpfungsgesetz	LSDB–G
Administrative Criminal Act	–	Verwaltungsstrafgesetz	VStG
Administrative High Court	–	Verwaltungsgerichtshof	VwGH
Aliens Police Act	–	Fremdenpolizeigesetz	FPG
Asylum Act	–	Asylgesetz	AsylG
Austrian Federal Economic Chamber	–	Wirtschaftskammer Österreich	WKÖ
Chamber of Labour	–	Arbeiterkammer	AK
Criminal Code	–	Strafgesetzbuch	StGB
Drop-in Centre for Undocumented Workers	UNDOK	Anlaufstelle zur gewerkschaftlichen Unterstützung undokumentiert Arbeitender	UNDOK
Employment Contract Law Adaptation Act	–	Arbeitsvertragsrechts-Anpassungsgesetz	AVRAG
European Agency for Fundamental Rights	FRA	Agentur der Europäischen Union für Grundrechte	FRA
European Convention on Human Rights	ECHR	Europäische Menschenrechtskonvention	EMRK
European Economic Area	EEA	Europäischer Wirtschaftsraum	EWR
European Migration Network	EMN	Europäisches Migrationsnetzwerk	EMN
European Union	EU	Europäische Union	EU
Federal Law Gazette	FLG	Bundesgesetzblatt	BGBl.
Federal Ministry of Finance	–	Bundesministerium für Finanzen	BMF
Federal Ministry of Labour, Social Affairs and Consumer Protection	–	Bundesministerium für Arbeit, Soziales und Konsumentenschutz	BMASK
Federal Procurement Act	–	Bundesvergabegesetz	BVergG
financial police	–	Finanzpolizei	–
Fiscal Administration Act	–	Abgabenverwaltungsorganisations-gesetz	AVOG
General Social Insurance Act	–	Allgemeines Sozialversicherungsgesetz	ASVG
gross domestic product	GDP	Bruttoinlandsprodukt	BIP
International Organization for Migration	IOM	Internationale Organisation für Migration	IOM
National Contact Point	NCP	Nationaler Kontaktpunkt	NKP
no information available	n/i	keine Informationen verfügbar	–

not applicable	n/a	nicht zutreffend	–
Public Employment Service	–	Arbeitsmarktservice	AMS
Residence Permit for Individual Protection	–	Aufenthaltsberechtigung besonderer Schutz	–
residence title for exceptional circumstances	–	Aufenthaltstitel aus berücksichtigungswürdigen Gründen	–
Settlement and Residence Act	–	Niederlassungs- und Aufenthaltsgesetz	NAG
small and medium enterprises	SME	kleine und mittlere Unternehmen	KMU
Supreme Court	–	Oberster Gerichtshof	–
Temporary Employment Act	–	Arbeitskräfteüberlassungsgesetz	AÜG
Temporary Residence Permit – Family Community	–	Aufenthaltsbewilligung – Familiengemeinschaft	–
third-country nationals	TCNs	Drittstaatsangehörige	–
Trade Union for Production Workers	Pro-GE	Die Produktionsgewerkschaft	Pro-GE
Trade, Commerce and Industry Regulation Act	–	Gewerbeordnung	GewO
Unemployment Insurance Act	–	Arbeitslosenversicherungsgesetz	AIVG

A.3 Bibliography

Literature

Deutsch, H., I. Nowotny and R. Seitz

2014 *Ausländerbeschäftigungsgesetz. Gesetze und Kommentare* 125. ÖGB Verlag, Vienna.

European Commission (EC)

2014 *Special Eurobarometer 402: Undeclared Work in the European Union*. Available at http://ec.europa.eu/public_opinion/archives/ebs/ebs_402_en.pdf (accessed on 20 October 2016).

European Migration Network (EMN)

2014 *Asylum and Migration Glossary 3.0*. European Commission. Available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/docs/emn-glossary-en-version.pdf (accessed on 4 January 2017).

2015a *Ad-Hoc Query on inspections to control the employment of irregular migrant*. Requested by COM on 24 June 2015. AHQ 2015.703. Available at https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/ad-hoc-queries-2015.703_inspections_to_control_the_employment_of_irregular_migrants_wider_diss.pdf (accessed on 25 February 2017).

2015b *Ad-Hoc Query on illegal working*. Requested by UK EMN NCP on 4 November 2015. AHQ 2015.1001. Available at www.emnbelgium.be/sites/default/files/publications/uk_emn_ncp_ad-hoc_query_on_illegal_working_compilation.pdf (accessed on 7 November 2016).

European Union Agency for Fundamental Rights (FRA)

2015 *Severe labour exploitation: workers moving within or into the European Union – States' obligations and victims' rights*. FRA, Vienna. Available at http://fra.europa.eu/sites/default/files/fra-2015-severe-labour-exploitation_en.pdf (accessed on 8 November 2016).

Federal Ministry of Finance

2016 *Die österreichische Steuer- und Zollverwaltung: Geschäftsbericht 2015*. Federal Ministry of Finance, Vienna. Available at www.bmf.gv.at/services/publikationen/BMF-BR_Geschaeftsbericht_Steuer_u_Zollverwaltung_2015.pdf?5lk2rg (accessed on 21 October 2016).

Jandl, M. et al.

2009 *Migration and Irregular Work in Austria. A Case Study of the Structure and Dynamics of Irregular Foreign Employment in Europe at the Beginning of the 21st Century*. Amsterdam University Press, Amsterdam.

Jandl, M., C. Hollomey and A. Stepien

2007 *Migration and Irregular Work in Austria: Results of a Delphi-Study*. International Labour Organization and International Centre for Migration Policy Development, Geneva. Available at www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/publication/wcms_201425.pdf (accessed on 20 October 2016).

Krenn, M. and E. Saunders

2012 *Prekäre Integration – Die soziale Verwundbarkeit von MigrantInnen und ihre Integration durch Erwerbsarbeit*. FORBA Forschungsbericht 4/2012. Forschungs- und Beratungsstelle Arbeitswelt, Vienna. Available at www.forba.at/data/downloads/file/791-FB-04-2012_PRINT.pdf (accessed on 3 November 2016.)

Lindmayr, M.

2012 *Handbuch zur Ausländerbeschäftigung*. 11th revised version. LexisNexis, Vienna.

National Contact Point Austria in the European Migration Network (AT EMN NCP)

2015 *The Organization of Asylum and Migration Policies in Austria*. IOM, Vienna. Available at www.emn.at/wp-content/uploads/2017/01/organisation-study_AT-EMN-NCP_2016.pdf (accessed on 22 February 2017).

Peyrl, J., T. Neugschwendtner and C. Schmaus

2015 *Fremdenrecht: Asyl, Ausländerbeschäftigung, Einbürgerung, Einwanderung, Verwaltungsverfahren*. 5th revised edition, ÖGB Verlag, Vienna.

Schneider, F.

2016 *Shadow Economy in Austria – the Latest Developments up to 2016*. Johannes Kepler University Linz. Available at www.econ.jku.at/%5Cmembers%5CSchneider%5Cfiles%5Cpublications%5C2016%5CShadEc_Austria.pdf (accessed on 3 February 2017).

Słubik, K. (ed.)

2014 *Unprotected. Migrant workers in an irregular situation in Central Europe*. Association for Legal Intervention (SIP), Warsaw. Available at <http://interwencjaprawna.pl/en/files/unprotected.pdf> (accessed on 2 December 2016).

UNDOK

2016 *Tätigkeitsbericht. 2 Jahre UNDOK-Anlaufstelle*. UNDOK, Vienna. Available at https://undok.at/wp-content/uploads/2014/06/UNDOK-Taetigkeitsbericht_2016.pdf (accessed on 7 December 2016).

Vienna Chamber of Labour and UNDOK

2014 *Arbeit ohne Papiere, ... aber nicht ohne Rechte! Arbeits- und sozialrechtliche Ansprüche von MigrantInnen bei undokumentierter Arbeit und die (aufenthaltsrechtlichen) Gefahren im Falle ihrer Durchsetzung*. 2nd edition, Vienna. Available at https://media.arbeiterkammer.at/wien/PDF/Publikationen/ArbeitundRecht/Arbeit_ohne_Papiere_2015.pdf (accessed on 2 December 2016).

Journal Articles

Enste, D.H. and F. Schneider

2006 Schattenwirtschaft und irreguläre Beschäftigung: Irrtümer, Zusammenhänge und Lösungen. In: Alt, J. and M. Bommers (eds.), *Illegalität – Grenzen und Möglichkeiten der Migrationspolitik*. VS Verlag für Sozialwissenschaften, Wiesbaden, pp. 35–59.

Jandl, M.

2007 Migration und Irregulärer Arbeitsmarkt. In: Fassmann, H. (ed.), *Zweiter Österreichischer Migrations- und Integrationsbericht 2001–2006*. Drava Verlag, Vienna, pp. 284–289.

European and International Treaties and Legislation

Agreement establishing an Association between the European Economic Community and Turkey, OJ L 361/1.

Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA), OJ L 203/1.

Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168/24.

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101/1.

Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State, OJ L 343/1.

Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers, OJ L 94/375.

Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation'), OJ L 159/11.

Austrian Legislation

Act Governing the Employment of Foreigners, FLG No. 218/1975, in the version of FLG I No. 113/2015.

Act to Combat Wage and Social Dumping, FLG I No. 44/2016.

Administrative Criminal Act, FLG No. 52/1991, in the version of FLG I No. 33/2013.

Aliens Police Act, FLG I No. 100/2005, in the version of FLG I No. 24/2016.

Asylum Act, FLG I No. 100/2005, in the version of FLG I No. 24/2016.

Criminal Code, FLG No. 60/1974, in the version of FLG I No. 154/2015.

Employees Act, FLG No. 292/1921, in the version of FLG I No. 152/2015.

Employment Contract Law Adaptation Act, FLG No. 459/1993, in the version of FLG I No. 44/2016.

Federal Office for Immigration and Asylum Procedures Act, FLG I No. 87/2012, in the version of FLG I No. 25/2016.

Federal Procurement Act, FLG I No. 17/2006, in the version of FLG II No. 250/2016.

Fiscal Administration Act, FLG I No. 9/2010, in the version of FLG I No. 105/2014.

General Civil Code, JLC No. 946/1811, in the version of FLG I No. 43/2016.

General Social Insurance Act, FLG No. 189/1955, in the version of FLG II No. 260/2016.

Labour and Social Courts Act, FLG No. 104/1985, in the version of FLG I No. 44/2016.

Parliament of the Republic of Austria, *Ministerial Proposal – Legislative Text: Draft*, available at www.parlament.gv.at/PAKT/VHG/XXV/ME/ME_00275/fname_574531.pdf (accessed on 8 February 2017).

Regulation for Skilled Workers 2017, FLG II No. 423/2016.

Residence and Settlement Act, FLG I No. 100/2005, in the version of FLG I No. 122/2015.

Settlement and Residence Act, FLG I No. 100/2005, in the version of FLG I No. 122/2015.

Temporary Employment Act, FLG No. 196/1988, in the version of FLG I No. 44/2016.

Trade, Commerce and Industry Regulation Act, FLG No. 194/1994, in the version of FLG I No. 82/2016.

Unemployment Insurance Act, FLG No. 609/1977, in the version of FLG I No. 31/2017.

Austrian Case Law

Administrative High Court, 11 May 2010, 2008/22/0845.

Supreme Court, 21 October 2008, 15 Os 116/08k.

Statistics

Federal Ministry of Finance

2016 *Reply to the Parliamentary Request No. 9964/J (XXV.GP) of 11 July 2016 regarding "illegale Ausländerbeschäftigung in Tirol"* (9519/AB of 9 September 2016). Available at www.parlament.gv.at/PAKT/VHG/XXV/AB/AB_09519/imfname_558284.pdf (accessed on 21 October 2016).

Financial Police

- 2017 Number of presumably illegal employed third-country nationals in criminal complaints by gender, nationality and infringement (2014–2016). Extracted from FinPol database.

Newspaper Articles and Press Releases

Die Presse

- n.d. *Ausgebeutet mit System: Wiens neue Sklaven*, available at http://diepresse.com/layout/diepresse/files/dossiers/wiens_neue_sklaven/ (accessed on 7 December 2016).
- 2016 *Strengere Regeln für Job-Migranten?*, 3 March 2016, available at http://diepresse.com/home/wirtschaft/recht/4942832/Strengere-Regeln-fuer-JobMigranten?_vl_backlink=/home/wirtschaft/index.do (accessed on 7 December 2016).

European Commission

- 2009 *Visa free travel for citizens of the former Yugoslav Republic of Macedonia, Montenegro and Serbia before Christmas*. Press release IP/09/1852, Brussels, 30 November 2009, available at http://europa.eu/rapid/press-release_IP-09-1852_en.htm?locale=fr (accessed on 23 January 2017).

UNDOK

- 2015 *Politische Forderungen*. Press release, 7 September 2015, available at https://undok.at/wp-content/uploads/2015/09/UNDOK-Anlaufstelle_Politische-Forderungen.pdf (accessed on 29 December 2016).

Internet Sources

Economic Chamber of Carinthia, *Pfuscherhotline*. Available at www.wko.at/Content.Node/branchen/k/Pfuscherhotline.html (accessed on 28 December 2016).

Economic Chamber of Carinthia, *Verjährung und Verfall*. Available at www.wko.at/Content.Node/Service/Arbeitsrecht-und-Sozialrecht/Arbeitsrecht/Dienstverhaeltnis/Aufloesung/Verjaehrung_und_Verfall.html (accessed on 12 December 2016).

Federal Government of Austria, migration.gv.at. Available at www.migration.gv.at/en/ (accessed on 27 December 2016).

Federal Ministry of Finance, *Financial Police*. Available at <https://english.bmf.gv.at/combating-fraud/Financial-Police.html> (accessed on 28 November 2016).

Hepl.gv.at, *Begriffslexikon >> Verjährung*. Available at www.help.gv.at/Portal.Node/hlpd/public/content/99/Seite.991339.html (accessed on 12 December 2016).

Pro-GE, *Information portal for seasonal workers*, available at www.sezonieri.at/servlet/ContentServer?pagename=P01/Page/Index&n=P01_64.0 (accessed on 1 February 2017).

Public Employment Service, *Informationen zur Ausländerbeschäftigung: Arbeitsmarktzugang für kroatische Staatsbürger/innen – Übergangsregelungen bis längstens 30.06.2020*. Available at www.ams.at/docs/001_Neue_EU-Buerger_08.pdf (accessed on 21 October 2016).

UNDOK - Anlaufstelle zur gewerkschaftlichen Unterstützung UNDOKumentiert Arbeitender, <http://undok.at> (accessed on 28 November 2016).

UNDOK, *Verband*. Available at <https://undok.at/de/verband/> (accessed on 7 December 2016).

Interviews and Other

Interview with Heinz Kutrowatz, Federal Ministry of Labour, Social Affairs and Consumer Protection, 19 December 2016.

Interview with Wilfried Lehner, financial police, 21 December 2016.

Interview with Sandra Stern, Drop-in Centre for Undocumented Workers (UNDOK), 16 December 2016.

UNDOK, *Information Workshop in the framework of the 6th Vienna Integration Week*, 17 May 2016, VHS Ottakring.

Written input by Margit Kreuzhuber, Austrian Federal Economic Chamber, 8 February 2017.

Written input by Katharina Lindner, Federation of Austrian Industries, 10 January 2017.